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A Border Trial Judge Looks at Immigration: Heeding the Call to do Principled Justice to the Alien Without Getting Bogged Down in Partisan Politics: Why the U.S. Immigration Laws are not Broken (But Could Use Some Repairs)

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ARTICLES

A BORDER TRIAL JUDGE LOOKS AT IMMIGRATION: HEEDING THE CALL TO DO PRINCIPLED JUSTICE TO THE ALIEN WITHOUT GETTING BOGGED DOWN IN PARTISAN POLITICS: WHY THE U.S. IMMIGRATION LAWS ARE NOT BROKEN (BUT COULD USE SOME REPAIRS)*

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It is common to turn on the news and see people, regardless of their political affiliation or what they want done with immigration reform, declaring that the U.S. immigration system is broken. Their proposed solution is almost always comprehensive immigration reform.

This Article suggests that the nation's immigration system is neither

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broken nor in need of comprehensive reform. The U.S. immigration system is not an appropriate target of ridicule, scorn, and embarrassment. Instead, the U.S. immigration system should be, as with many other things in our great and special country, a source of pride and emulation.

After about 400 years of immigration, during Colonial times and under the U.S. Constitution, the nation has developed an immigration system that is largely race-neutral and no longer ethnic or religious centric. When compared to other nations, it remains extremely welcoming to immigrants. Much of the world's other countries do not want immigrants at all, while other nations that welcome immigrants do so for selfish reasons. Instead of asking what the immigrant can do for our nation's economy, the United States still welcomes more immigrants for family reunification reasons than for reasons of economic self-interest.

Much of the current public discussion about immigration focuses on either the politics of changes or on border security. This Article is primarily interested in how a nation does justice to the alien. It also seeks to explain how a nation can do justice to aliens through application of civil and race-neutral principles. To explain how a nation provides justice this way, the Article looks at theology, philosophy, political science, and history to derive these principles. The Article then uses those civil and non-racial principles to inform how the United States should deliver justice to aliens going forward and foster an intelligent and civil public debate on immigration. The Article concludes that what the United States needs is incremental change to its immigration law, not comprehensive immigration reform, because the U.S. immigration laws, by and large, reflect well the nation's core values. Ultimately, the Article proposes four incremental steps that the nation needs to take through application of race-neutral principles to improve its immigration system and to make just policy measures.

I. IMPORTANCE OF THE TASK

There are reasons that a great nation, or any nation, should be concerned about how to treat aliens. How the United States treats an alien within its borders is an important task. A century ago, Winston Churchill reflected that "[t]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."[1] Churchill's assessment of a nation's criminal justice system applies equally to a nation's immigration system. A great nation is a just nation. Justice requires that a just nation treat

1. Rhem v. Malcolm, 371 F. Supp. 594, 596–97 (S.D.N.Y. 1974) (quoting British Home Secretary Winston Churchill, Address at the House of Commons (July 20, 1910).

aliens justly. It is therefore important that lawyers be concerned with how the legal system treats aliens. Moreover, providing justice to the alien is not only a political issue, a public policy issue, or even a legal or criminal issue. It is a moral and ethical issue, and for some, it is a matter of faith.

II. WHY DOES AMERICA DEMAND JUSTICE FOR THE ALIEN?

It is worth pausing to recognize that the United States is, by and large, obsessed with demanding justice for the alien. The U.S. attitude toward aliens is best understood when compared with that of other nations. For example, starting in the late 1980s Japan experienced a boost in immigrant laborers from Brazil.[2] With the Immigration Control and Refugee Recognition Act of 1990, Japan formally authorized the entry of descendents from Japanese emigrants who grew up in foreign countries, otherwise known as Nikkeijin.[3] Japan limited the time the Nikkeijin were authorized to stay in the country to renewable three-year periods.[4] Between 1991 and 1998, the number of Nikkeijin living in Japan more than doubled from 96,377 to 211,275.[5] The economy turned in 2009 and Japan then offered its Nikkeijin community a one-time cash payment and free flight back to their home countries with the caveat that they never return.[6] Underlying this scenario is the common belief in Japan that it is impossible for foreigners to become Japanese even if they are the descendents of former ethnic Japanese citizens.[7]

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2. *See* TAKEYUKI TSUDA, *Preface to* STRANGERS IN THE ETHNIC HOMELAND: JAPANESE BRAZILIAN RETURN MIGRATION IN TRANSNATIONAL PERSPECTIVE, at xi (2003); Jane H. Yamashiro, *Nikkeijin*, *in* ENCYCLOPEDIA OF RACE, ETHNICITY AND SOCIETY 983, 983–84 (Richard T. Schaefer ed., 2008).

3. The Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, amended by Law No. 135 of 1999, provisional translation (Japan), *available at* http://www.japaneselawtranslation.go.jp/law/detail/?id=1934&vm=&re=.

4. *Id.* art. 21.

5. Claire J. Hur, *Returnees from South America: Japan's Model for Legal Multiculturalism?*, 11 PAC. RIM L. & POL'Y J. 643, 652 (2002) (citing Basic Plan for Immigration Control, 2d ed., Ministry of Justice, Mar. 2000, provisional translation, pt. II.1(4), *available at* http://www.moj.go.jp/ENGLISH/information/bpic2nd-02.html#2-1-4 (last visited Aug. 23, 2013)).

6. Kristen McCabe et al., *Pay to Go: Countries Offer Cash to Immigrants Willing to Pack Their Bags*, MIGRATION POLICY INSTITUTE (Nov. 2009), *available at* http://www.migrationinformation.org/Feature/display.cfm?ID=749 ("To qualify for the program, workers must be unemployed and prove that they had entered and worked in Japan before April 1, 2009. The program offers $3,000 to the applicant and $2,000 to each dependent to cover airfare. The government allows immigrants to keep any unused amount.").

7. *See* Hur, *supra* note 5, at 680 ("Japan's racial dynamics are grounded in an ossified belief in the 'myth of homogeneity'—a carefully designed and perpetuated conception of a unique Japanese race. It is the notion that the Japanese people (*minzoku*) possess what are assumed to be unique historical, geographical, and cultural characteristics of the Japanese nation.").

By contrast, the U.S. Statue of Liberty welcomes immigrants to the harbor of New York, proclaiming: "Give me your tired, your poor, Your huddled masses yearning to breathe free."[8] One of the reasons the United States has always had a desire to do justice to the alien, and not just use the alien for selfish purposes, is the strong Judeo-Christian basis for delivering justice to the alien in the scripture from both of these faiths, which for most of the nation's history, had a strong influence on its laws and public policies.

While often unnoticed in an increasingly secular society, the Bible has a strong theology of life as an alien running throughout it. The Torah, and the Bible more generally, are very explicit about moral duties to foreigners in the land.

The Bible's focus on immigration can be found first in Genesis, when God made a covenant with Abraham that Abraham's descendants will come out of Egypt with great possessions and come back to Palestine, the promised land. Before the Genesis writer gets to the deliverance, and before Moses parts the Red Sea, God says to Abraham: "Know this for certain, that your offspring shall be aliens in a land that is not theirs, and shall be slaves there, and they shall be oppressed for four hundred years."[9]

In the book of Exodus, Moses is about to go back to Egypt to deliver the Israelites out after 400 years. He names his son Gershom, which means, "alien in a foreign land" or "stranger."[10] The context of this book suggests that Moses was naming his son after the way he saw himself. Thus, despite his high position in Egypt, Moses may have considered himself an alien during his time in Egypt.

The Torah continues to develop this theme as it prescribes societal rules. Deuteronomy, the fifth book of the Pentateuch, includes a discussion of kosher laws, which includes the decree: "You shall not eat anything that dies of itself; you may give it to aliens residing in your towns for them to eat, or you may sell it to a foreigner."[11] Although the meat was unholy for Jews, it could be given to aliens. It could not be sold. It is also important that there is a distinction between aliens and foreigners. Aliens were part of the community, and deserved a higher level of care. Aliens were not Jews, however, creating a dichotomy of residential status within the country. This classification also makes a distinction among those who are foreigners and want to come to the country, those who have just arrived in the country but live there, and those who have long resided in the country.

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8. EMMA LAZARUS, THE NEW COLOSSUS (1883).

9. *Genesis* 15:13 (New Revised Standard Version).

10. *Exodus* 18:2–3 (New Revised Standard Version) ("After Moses had sent away his wife Zipporah, his father-in-law Jethro took her back, along with her two sons. The name of the one was Gershom (for he said, 'I have been an alien in a foreign land').").

11. *Deuteronomy* 14:21 (New Revised Standard Version).

There are also references to aliens in Job and the Book of Psalms.[12] In these passages, the focus is directed particularly at the psychological difficulty of being an alien. The psychological toll associated with the isolation and separation from family or even loss of loved ones is not to be discounted. The alien can often feel like a stranger even when surrounded by a community of new friends. As a recently published study indicates, the very stress associated with legal immigration can cause multi-generational impacts.[13]

Conversely, the idea or fear, that outsiders are taking over the homeland is also not new. The Old Testament prophets were particularly concerned that the promised land was being overrun by aliens or foreigners. Isaiah warns: "Strangers shall stand and feed your flocks, foreigners shall till your land and dress your vines..."[14] This fear is continued in Lamentations: "Our inheritance has been turned over to strangers, our homes to aliens."[15]

Not surprisingly given its identification with aliens, the Bible develops a robust moral code to protect aliens from the harms associated with immigrating. Returning to the second book of the Pentateuch, Exodus, the reader first sees a prohibition: "You shall not oppress a resident alien; you know the heart of an alien, for you were aliens in the land of Egypt."[16] Deuteronomy then provides an elaboration on what it means not to oppress an alien: "You shall not deprive a resident alien or an orphan of justice; you shall not take a widow's garment in pledge.

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12. *Job* 19:14–15 (New Revised Standard Version) ("My relatives and my close friends have failed me; the guests in my house have forgotten me; my serving girls count me as a stranger; I have become an alien in their eyes."); *Jobs* 31:32 (New Revised Standard Version) ("the stranger has not lodged in the street; I have opened my doors to the traveler"); *Psalms* 69:8 (New Revised Standard Version) ("I have become a stranger to my kindred, an alien to my mother's children.").

13. Cecilia Magnusson et al., *Migration and Autism Spectrum Disorder: Population-based Study*, 201 BRIT. J. PSYCHIATRY 109, 114 (2012) (finding that when a pregnant mother immigrates to another country, the risk of her child developing low-functioning autism increases). *See also* Sam Wang, *Hurricanes, Emigration, and Autism*, WELCOME TO YOUR BRAIN (Mar. 6, 2012, 11:32 AM), http://www.welcometoyourbrain.com/2012/03/hurricanes-emigration-and-autism.html (relating the stress expectant mothers experience while immigrating with the stress experienced by expectant mothers trying to flee hurricanes); SANDRA AAMODT & SAM WANG, WELCOME TO YOUR CHILD'S BRAIN: HOW THE MIND GROWS FROM CONCEPTION TO COLLEGE (2011) (stating that the incidence of autism is significantly higher for children whose mothers has been stressed during pregnancy, which could indicate that the increased stress associated with immigrating illegally versus the legal immigration process could produce higher levels of autism).

14. *Isaiah* 61:5 (New Revised Standard Version).

15. *Lamentations* 5:2 (New Revised Standard Version). In Ephesians, the writer states: "[R]emember that you were at that time without Christ, being aliens from the commonwealth of Israel and strangers to the covenants of promise, having no hope and without God in the world." The First Epistle of Peter, verse 2:11 states: "Beloved, I urge you as aliens and exiles to abstain from the desires of the flesh that wage war against the soul." The Bible demonstrates a tradition of reminding its readers that one way or another all people are aliens.

16. *Exodus* 23:9 (New Revised Standard Version).

Remember that you were a slave in Egypt and the Lord your God redeemed you from there; therefore I command you to do this."[17] This verse ties the oppression of aliens to the justice system. In Leviticus the theology of how to treat the alien is fully developed when the writer goes much further in his demand of the Israelites in how they treat aliens: "The alien who resides with you shall be to you as the citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt: I am the Lord your God."[18]

In the New Testament, the concept expounded in Leviticus is most vividly displayed in the story of the Good Samaritan.[19] The Samaritan's ancestors had been pulled out of Mesopotamia centuries earlier and were planted in the Jewish Promised Land. At best, the Samaritans were considered second-class citizens, but when asked who is our neighbor and what neighbor shall we love, Jesus responded that it is the alien who is our neighbor and whom we shall love.[20]

Christianity is not alone in proclaiming that there are moral duties owed to the foreigners living among citizens. The Koran mentions immigration (*higrah* or *hijra*) in 27 verses. *Higrah*, however, is the term is most often used to describe the act of Muslims fleeing from a country governed by infidels to join the Islamic community.[21] This concern stems from Muhammad's escape from Mecca to avoid persecution in 622.[22] When he arrived in Medina, he and his followers were called *Muhagirin* (the immigrants), and those who welcomed them were call *ansar* (the supporters).[23]

A key to understanding Muhammad's immigrant status is found in the way Islamic jurists have divided the world into two halves: *Dar al-islam* (the land of Islam) and *Dar al-harb* (the land of war).[24] The land of Islam includes all of the territories under Muslim control. The land of war includes all of the non-Muslim territory and its inhabitants. To avoid war, those people from non-Muslim lands can choose one of three options. First, they can convert to Islam; second, if they choose to remain in their own monotheistic religion, they could submit to the Muslim land's political authority and pay a tribute; or finally, as a temporary solution, they may sign a peace treaty.[25]

As a result of the earth being broken into these dual territories, those

17. *Deuteronomy* 24:17–18 (New Revised Standard Version).

18. *Leviticus* 19:34 (New Revised Standard Version).

19. *Luke* 10:29–37 (New Revised Standard Version).

20. *Id.*

21. Sami A. Aldeeb Abu-Sahlieh, *The Islamic Conception of Migration*, 30 INT'L MIGRATION REV. 37, 37 (1996).

22. *Id.* at 38.

23. *Id.*

24. *Id.* at 39.

25. *Id.* at 42.

aligned with and those independent from Islam, immigration and migration questions for both Muslims and non-Muslims alike are created. For Muslims, the original interpretations of the Koran stated a belief that the land of Islam should be seen as a vast empire, made up of different nations perhaps, but with no restrictions on a Muslim's movement or residence within it.[26] This lack of restrictions on Muslim movement gave way as friction among Islamic ethnic groups emerged, along with conflicts between regional or national Muslims within the Islamic lands.[27] As a result, in the Fifteenth century, the idea of freedom of migration among Islamic countries was restricted to a freedom to immigrate or migrate to those territories that shared a link of blood (*assabiyyah*).[28]

Non-Muslims (*harbi*) in Islamic lands benefited from the jurists' interpretations of the Koran's command that Muslims protect polytheists who seek their protection.[29] From this promise, the jurists developed the practice of *aman* (pledge of security) for visiting non-Muslims.[30] The pledge did not require the non-Muslim to convert to Islam, but if he or she stayed for more than one-year, they were required to pay a tribute, and the *harbi* was prohibited from acquiring property that could be used against the Muslims, such as weapons, slaves, and horses.[31] This early pledge of security to outsiders helped lay the groundwork for the Franco-Ottoman alliance of 1536, which has been called "the first nonideological diplomatic alliance of its kind between a Christian and non-Christian empire."[32]

Outside of scripture, Plato addressed issues relating to immigrant rights.[33] Although Plato did not discuss immigration in depth, in the *Republic* he does speak to the danger of a democracy getting "drunk by drinking more than it should of the unmixed wine of freedom."[34] Among the consequences of unrestricted freedom, Plato writes, is that "[a] resident alien or a foreign visitor is made equal to a citizen, and he is their equal."[35] In ancient Greece, a Metic was any resident alien, including

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26. Aldeeb Abu-Sahlieh, *supra* note 21, at 40–41.

27. *Id.* at 41.

28. *Id.*

29. THE KORAN INTERPRETED 9:6, at 207 (Arthur J. Arberry trans., Collier Books, Macmillan Publ'g 1986) (1955) ("And if any one of the idolaters seeks of thee protection, grant him protection till he hears the words of God; then do thou convey him to his place of security—that, because they are a people who do not know.").

30. Aldeeb Abu-Sahlieh, *supra* note 21, at 42.

31. *Id.*

32. ROBERT A. KANN, A HISTORY OF THE HABSBURG EMPIRE: 1526–1918, at 62 (1980).

33. PLATO, COMPLETE WORKS (John Cooper ed., 1997).

34. *Id.* at 1173.

35. *Id.*

freed slaves.[36] As a recognized part of the community, Metics were protected by law but subject to restrictions on marriage and property ownership.[37] Despite the generality of Plato's cautionary warning in the *Republic*, scholars have found that Plato was more concerned with keeping the political rights of citizens and Metics separate.[38]

During Plato's time, citizenship in Athens was an inheritance parents provided to children, so it was impossible for many of the working class Metics to ever gain citizenship.[39] While Athens's resident aliens were treated much more favorably than slaves, in Plato's *Laws*, the Athenian character proposes an even tougher standard than was in place during Plato's time—that no foreigners should be allowed to stay longer than a reasonable length of time, and upon arrival each foreigner is only conditionally welcomed based on their status.[40]

By deduction, Plato was aware of the state's right to limit or control its immigration policy. Further, he saw citizenship and residence not only as two different things, but presented the possibility that should the Metics gain enough wealth and social status over the course of time or even over generations, then the citizenship through inheritance model could be overturned.[41] While Metics were allowed to live in the country so long as they did not accumulate the social or economic status of citizens, they also were not subject to taxes or military service.[42] The Metics also received protection of the law, although not to the same level as citizens.[43]

Aristotle was a Metic himself, but did not speak any more directly to the ethics of citizenship exclusion than Plato had done before him.[44] In fact, Aristotle defended the Athenian policy prohibiting citizenship to the Metics.[45] While others argued that co-residence and shared labor should be enough to establish political membership, Aristotle wrote: "A citizen does not become such merely by inhabiting a place."[46] In his view,

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36. BRITANNICA CONCISE ENCYCLOPEDIA 1246 (2006).

37. *Id.*

38. *See* EDWARD E. COWEN, THE ATHENIAN NATION 21–22 (2000) (quoting M.H. HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 87 (1991)) ("Indeed in every aspect of Athenian life other than the political, our sources chronicle a consistent rapport between *politai* and other free residents of Athens: 'metics and citizens turn up on an equal footing without the slightest trace of social demarcation . . . .'").

39. *See* SUSAN LAPE, RACE AND CITIZEN IDENTITY IN THE CLASSICAL ATHENIAN DEMOCRACY 2 (2010).

40. PLATO, *supra* note 33, at 1601–02.

41. *Id.*

42. *Id.*

43. *Id.*

44. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 53–54 (1983).

45. *Id.*

46. *Id.* at 54 (quoting ARISTOTLE, POLITICS (c. 340 BCE), *in* THE LIBERAL TEMPER IN GREEK

citizenship required a level of excellence that was not available to everyone.[47] Aristotle's views were perhaps limited to the conception in practice at the time that citizenship in Athens was not something that could be distributed.[48] All the citizens could do was offer aliens fair treatment, and in turn fair treatment was all the aliens could ask of the citizens.

Centuries later, the Dutch jurist Hugo Grotius, a contemporary of John Locke, was credited as being one of the originators of international law.[49] Grotius was also a proponent of the idea that humankind shared common ownership of the earth.[50] According to Grotius, an individual may use the natural resources he or she needs for survival without interference from others.[51] This principle does not, however, guarantee every individual an equal share of such resources. Rather, Grotius wanted to ensure that each person's status as a co-owner was respected.[52]

The theory of common ownership is based on the conception that, because the earth and its resources are not the result of anyone's accomplishment, they are collectively owned by all of humankind.[53] While supporters of open borders have presented similar egalitarian ownership theories,[54] the theory of common ownership is distinguishable in that it reserves that "resources, including land, ought to be seen as shared property *unless* principles of allocation are justifiable to all who have a potential interest in their use."[55] One justification would be consistent with Locke's labor theory of property, whereby a person creates their right to a piece of property by mixing his or her labor with what was once collectively owned.[56] The common ownership theory does not rely on a shared understanding of the citizens or members of a state, but rather rests on the basis that a political body can assert its right to control immigration based on its justifiable allocation of what was shared property.

POLITICS 367–69 (Eric Havelock trans., 1957)).

47. *Id.*

48. *Id.* at 53.

49. STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 1 (1991).

50. *Id.*

51. 2 HUGO GROTIUS, OF THE RIGHTS OF WAR AND PEACE 26 (Rev. John Morrice ed., 1715) (1625) ("[E]very Man then converted what he would to his own use, and consumed whatever was to be consumed; and a *free use* of this *Universal Right* did at that time supply the place of Property, for no Man could justly demand of another, whatever he had thus first taken to himself . . . .").

52. Michael Blake & Mathias Risse, *Immigration and Original Ownership of the Earth*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 143 (2009).

53. *Id.* at 134, 137.

54. *See, e.g.*, Kevin R. Johnson, *Open Borders*, 51 UCLA L. REV. 193 (2003); R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV 1265 (1994).

55. Blake & Risse, *supra* note 52, at 139 (emphasis added).

56. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 196 (7th prtg. 1772) (1689).

The basis of common ownership therefore does not mandate that every individual have a claim to any piece of land at any spot on the earth. Rather, it provides that individuals who are excluded from an area must have their exclusion justified.[57]

Justification for exclusion can come from one nation's overuse of the land or the availability of specific resources the immigrant would like to claim as a co-owner. Overuse can be one viable justification a nation would have to assert against the would-be immigrants from another country. An under-using nation is not, however, necessarily bound to accept immigrants from other nations. Rather, under-users can provide possible immigrants with a portion of territory for them to form their own political body or allow for their immigration.[58]

Immanuel Kant's categorical imperative holds that everyone should unconditionally "[a]ct only according to the maxim by which you can at the same time will that it should become a universal law."[59] This theory is based on the golden rule and could be cited as a basis for the argument that the very idea of a closed border is immoral. Kant, however, did not see open borders as a moral imperative. Rather, in his third article of *Perpetual Peace*, Kant wrote that the one universal right belonging to human beings in the world community is the right to hospitality.[60] The nature of this right means that if a potential immigrant arrives at a nation's border and is there for peaceful purposes, the host country cannot deny them access. Kant went on to explain, however, that while this right to hospitality guarantees access to the contacts, lands, and resources within a host country, the right does not extend indefinitely.[61] Rather, Kant saw the right to universal hospitality as a guarantee of visitation, which could be regulated.[62]

Perhaps the best defense for any country's decision to close its borders or limit immigration comes from Michael Walzer's[63] exposition of what

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57. Blake & Risse, *supra* note 52, at 145.

58. *Id.* at 152.

59. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (Lewis White Beck trans., Macmillan Publ'g 1st ed. 1988) (1969).

60. IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch (1795)*, *in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 118 (Ted Humphrey trans., 1983) ("*[H]ospitality* (hospitableness) means the right of an alien not to be treated as an enemy upon his arrival in another's country.").

61. PAULINE KLEINGELD, KANT AND COSMOPOLITANISM: THE PHILOSOPHICAL IDEAL OF WORLD CITIZENSHIP 76 (2012).

62. *Id.*

63. Walzer, a onetime colleague of John Rawls, is best known for his book *Just and Unjust Wars* and is a faculty member in the School of Social Science at the Institute for Advanced Study in Princeton, N.J. Institute for Advanced Study, http://www.ias.edu/people/faculty-and-emeriti/walzer (last visited July 26, 2013); Jeffrey J. Williams, *Michael Walzer's Politics, in Theory and Practice*, CHRON. HIGHER EDUC., June 3, 2012, *available at* http://chronicle.com/article/Michael-Walzers-Politics-in/132041.

has come to be known as communitarianism.[64] This theory explains that political membership is created by the shared understandings of any given community.[65] With these shared understandings in place and agreed upon, the community then is able to control the size and distribution of its membership.[66]

The late Alexander Bickel[67] explains the same basis for regulating immigration in his book *The Morality of Consent.*[68] Bickel argues that a free and autonomous nation must be able to decide for itself how to limit its own freedom by taking on a responsibility to others.[69] Bickel goes further by making the case that the free nation has unlimited power to decide whether, under what conditions, and with what effects it would consent to enter into a relationship with a stranger.[70]

Echoes of Bickel's unlimited national power argument are found in Walzer's assertion that national sovereignty is the only basis a country needs for closing its borders.[71] A nation's sovereignty, as recognized by international law, provides that the nation must be free to decide how to limit its own freedom by taking in immigrants.[72] "The nation, in this understanding, possesses the unlimited power to decide whether, under what conditions, and with what effects it would consent to enter into a relationship with a stranger."[73] The sovereignty argument has been criticized recently, however, with opponents often citing the globalization of the economy as status-changing constraint on any country's sovereignty.[74]

Unlike Bickel's autonomous model, however, Walzer sees the mutual aid principle as being the one exception to the communal power to exclude.[75] Kant held that the categorical imperative prohibits refusing to

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64. *See also* Shelley Wilcox, *The Open Borders Debate on Immigration*, 4 PHIL. COMPASS 1, 2 (2009).

65. WALZER, *supra* note 44, at 31.

66. *Id.*

67. *See* Ronald Collins, *Online Alexander Bickel Symposium: Foreword – Looking Back While Moving Forward*, SCOTUSBLOG, (July 26, 2013), http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-foreword-looking-back-while-moving-forward/.

68. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975).

69. Peter Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 875 (2008).

70. *Id.*

71. WALZER, *supra* note 44, at 61.

72. Montevideo Convention on the Rights and Duties of States art. 9, Dec. 6, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

73. Schuck, *supra* note 69, at 875.

74. *Id.* at 875 n.30 (citing FAREED ZAKARIA, THE POST-AMERICAN WORLD 4, 42, 44–45 (2008)).

75. WALZER, *supra* note 44, at 33; *see also* Wilcox, *supra* note 64, at 3 (Akin to Kant's categorical imperative, Walzer's mutual aid "principle maintains that a society is obligated to provide positive assistance to strangers if such help 'is needed or urgently needed' by the

assist others but Walzer sees the positive assistance requirement of the mutual aid principle as more coercively impacting a political community. According to Walzer, a person is required to provide assistance to another if it is both needed and ifthe costs of providing that assistance are relatively low; for a larger society, the displacement of costs and risk among a wide population make most forms of assistance relatively low cost.[76]

Walzer continues that "[t]he right to restrain the flow [of immigrants] remains a feature of communal self-determination. The principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's understanding of itself."[77] So, while the mutual aid principle requires assistance, according to Walzer, this principle does not require the community to provide full and permanent membership to those in need.

As others have pointed out, however, that a community holds the power to choose whom to admit and whom to exclude but this does not mean it has to exercise that power.[78] By choosing to not use that power, the community or nation would not be waiving its sovereignty. Just as a state does not relinquish its sovereignty when it chooses not to use the death penalty in criminal sentencing, likewise its possible choice to not close its borders does not sacrifice sovereignty. This criticism of the communitarian basis for closed borders may be a valid appeal for not enforcing a border control policy. However, it does not contradict the conclusion that the shared understandings of a nation's citizens can choose to close its borders.

Should the United States ever decide to completely open its borders, its immigration policy would then become whatever Mexico and Canada decide to allow across their borders. The number of aliens being caught by the Border Patrol who are not Mexican nationals is already significant. The Border Patrol uses the term "Other than Mexican" (OTM) to describe this group. In 2011, and there were 54,098 OTM immigration apprehensions over the entire country.[79] Out of the 2011 OTM apprehensions, 46,997 occurred in the Southwest Border Section, and 255 of these OTM immigrants were from special interest countries.[80]

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beneficiaries, and if 'the risks and costs of giving it are relatively low' for the benefactor.").

76. WALZER, *supra* note 44, at 45 ("[M]utual aid is more coercive for political communities than it is for individuals because a wide range of benevolent actions is open to the community which will only marginally affect its present members considered as a body . . .").

77. *Id.* at 51.

78. R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1271–72 (1994).

79. U.S. BORDER PATROL, DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL FISCAL YEAR 2011 PROFILE (2012), *available at* http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy11_stats/fy_profile_2011.ctt/fy_profile_2011.pdf.

80. *Id.*

In the El Paso sector, which is made up of the City of El Paso and all of New Mexico, there were 1,444 OTM apprehensions in 1999, rising to 4,899 OTM apprehensions in 2005, but by 2011, this number fell to 712.[81]

If society believes that certain people can be locked up for the safety of the community, it must also acknowledge that there are people it does not want to come to the United States. There are bad people out there and it is just to protect the nation's cities from these people. The United States does not want them in the country, and it is not unjust to exclude them.

In sum, it is not unjust to have closed borders and certainly not unjust to regulate immigration. A nation has a right to decide its membership. None of the principles of religion, philosophy, or political science suggest that justice requires open borders or that all aliens and foreigners must be made citizens.

III. JUSTICE, AND THE DEBATE OVER IMMIGRATION LAW, MUST BE BASED ON CIVIL, NON-RACIAL PRINCIPLES

Justice and the debate on immigration laws, must be based on civil, non-racial principles. One major contribution that the nation has made to the world is a serious attempt at a color-blind society. The United States is not there yet. But the country gave equality a first, firm step in the Declaration of Independence, fought a civil war over it, and has worked hard on racial equality over the last sixty years. Justice in the United States is closely aligned with non-discrimination on the basis of race. Accordingly, justice and the debate on aliens should also be based on civil, neutral, non-racial principles.

It is unlikely and perhaps undesirable for the immigration laws to eliminate one element of immigration in which race may play a positive role. Unless the United States wants to go to a first apply/first-in approach, rather than a nation-by-nation quota system, there is no way to take this race-based element out of the country's immigration laws. Thus, this Article will not call into serious question this race-based component of U.S. immigration laws.

There remain, however, two race-based components to the immigration debate that are more insidious. One is obvious, and one is latent. One is generally condemned, and one is generally not. This Article suggests that both race-based factors are illegitimate and/or at least are inappropriate considerations.

The first race-based factor of the debate that is often heard is aimed at particular races. It can be any race. For illustrative purposes, however, the Article will focus on the debate as it relates to Hispanics.

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81. *Id.*

Some voices in the debate imply that the nation has too many Hispanics or members of some other race; that they are coming in such large numbers that they are changing the character and/or culture of certain communities and/or regions; that they are still loyal to Mexico or to their home countries; that they are not assimilating into the country well; that they speak Spanish or some other language and do not speak English; that English-speaking citizens have to endure conversations, advertisements, or documents in foreign languages; or some combination of these complaints. In other words, the complaints about immigrants are anti-Hispanic, or anti-some other nationality. However, that people oppose immigration because they do not like that race or think that there are too many of that race does not seem consistent with the values of a race-neutral society or a race-neutral government. Thus, this race-based factor in the debate is an inappropriate one on which to base any major reform. It is also a factor that should probably drop out of the debate entirely if the quality of the debate is to improve.

The second race-based factor in the debate is the flipside of the other. It is that Hispanics, or in particular, Mexican nationals, or some other race or nationality, should be given a preference. This factor is heard in various forms—there should be open borders with Mexico, or the U.S. immigration laws should not divide families. The judicial author tries at least once a year, often on Law Day, to go into schools to talk to young people about our constitutional form of government, especially about the judiciary. When the judicial author can, he often goes to public schools in the low-income areas of the state, which often have a large Hispanic population. With the introduction of No Child Left Behind, there is an emphasis on mathematics and science in the public schools, to the exclusion or at least diminishment of time spent on civics and government. The young people often press for open borders with Mexico. Even when confronted with the security concerns of having, perhaps, open borders with Saudi Arabia after 2001, the young people are not deterred in their demand for open borders with Mexico.

While these factors may be legitimate when discussing the effect that current immigration laws have on families, the preference for one race or nationality is as illegitimate as the discrimination against a race or nationality. The reason is obvious, although not universally accepted. Unless the nation is going to have unlimited immigration, to prefer one race or nationality over another discriminates against other races and nationalities. If the nation is going to limit numerically in any way immigration, whether by quota or some other method, allowing in more of one race or nationality decreases the number of other races and nationalities. As a general principle, U.S. immigration policy should be color blind, neither discriminating against race or nationality or preferring a race or nationality.

IV. HISTORY OF THE U.S. IMMIGRATION LAWS

Britain's Naturalization Act of 1740, which provided a uniform mehanism for naturalization throughout the British Empire,[82] required immigrants seeking naturalized citizenship pay a fee and "reside for at least seven years in the colony, prove that they were religiously observant Protestants, and have their names entered in local court records."[83] In 1773, Britain further restricted the colonies' ability to attract immigrants by vetoing laws that encouraged emigration from Britain and banning the possibility of more liberal naturalization practices under any colony's own laws.[84] The Crown's prohibition on the colonies' independent naturalization practices led to the citation in the Declaration of Independence that the King "endeavored to prevent the population of these States" as one justification for the Revolution.[85]

After the Revolutionary War, the states each retained their own naturalization policies.[86] For example, the constitutions of Pennsylvania, Vermont, and North Carolina all established a two-tiered approach that extended all of the rights of citizenship on immigrants after two years of residency.[87] While each state set relatively open citizenship terms in an attempt to encourage population growth, variances existed from state to state. Longer residency periods were generally required in the South.[88]

Immigration was different from naturalization both before and after the Revolutionary War. While the colonies were in competition among themselves to attract immigrants from Britain and Europe who could become citizens, there was a push back against the British practice of sentencing vagrants and felons to the colonies.[89] In an attempt to exclude poor and criminal immigrants from reaching their borders, the colonies began legislating against their admittance in 1639.[90] This legislation tried to exclude the poor and sick who traveled voluntarily as well as those sent from British courts.[91] Some colonies also attempted to exclude or limit

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82. The British Naturalization Act, 1740, 13 Geo. 2, c. 7 (Eng.).

83. James Pfander, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 382 (2010).

84. An Act Amending the Act for Naturalizing Foreign Protestants, 1773, 13 Geo. 3, c. 21 (Eng.).

85. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776); Pfander, *supra* note 83, at 382.

86. Pfander, *supra* note 83, at 383.

87. *Id.* at 381 ("After one year, the newly arrived Pennsylvanian became a free denizen, with most of the rights of a natural-born citizen, and a full citizen one year later").

88. *Id.*

89. DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE 2 (5th ed. 2005).

90. *Id.*

91. *Id.*

Quaker and Catholic immigrants through legislation or discriminatory taxes.[92] Head taxes and deportation were further colonial solutions to the influx of undesirable immigrants.[93]

The Articles of Confederation established that the free citizens of any state could travel throughout the several states, and enjoy the "privileges and immunities" of a free citizen wherever they went.[94] The Articles did not include a provision dealing with naturalization, leaving the State's own laws in place. This situation created the possibility that an alien wishing to work in the South could circumvent South Carolina's longer wait period by immigrating to Pennsylvania first and gaining citizenship there before heading south. James Madison was quick to realize this possible loophole and argued for a uniform naturalization rule in 1782.[95] Arguments for a uniform naturalization standard applicable to all of the states led to the inclusion of the Naturalization Clause in the Constitution, mandating Congress to "establish an uniform Rule of Naturalization."[96]

There was no similar direct constitutional provision giving the federal government the power to regulate or close off immigration to the country. For nearly 100 years after the Revolutionary War, it was unclear if such a power could be imputed.[97] In that time, Congress did not pass any legislation aimed at limiting immigration directly. With the absence of any federal stance, the status of each state's prior colonial immigration control enactments remained in question.[98] However, the issue was resolved when the Supreme Court of the United States held in *Henderson v. City of New York*, 92 U.S. 259 (1875), that state restrictions on immigration were unconstitutional infringements on the federal power over foreign commerce.[99]

Congress created its first naturalization legislation in 1790 with the passing of the Naturalization Act. Eight years later, the Alien and Sedition Acts of 1798 was signed by President Adams. This required immigrants seeking citizenship to reside in the United States for 14 years.[100] In addition, the president could deport aliens posing a safety

92. *Id.* at 1–2.

93. *Id.* at 3.

94. Pfander, *supra* note 83, at 383–84 (citing ARTICLES OF CONFEDERATION OF 1781, art. IV).

95. *Id.* at 384.

96. U.S. CONST. art. I, § 8, cl. 4.

97. WEISSBRODT & DANIELSON, *supra* note 89, at 3.

98. *Id.* at 3–4.

99. *Id.* at 4.

100. The Alien and Sedition Acts were a collection of four acts enacted in less than four weeks during the summer of 1798. *See* Naturalization Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798); Alien Friends Act of 1798, ch. 58, 1 Stat. 570 (1798); Alien Enemies Act 1798, ch. 66, 1 Stat. 577 (1798); Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798). *See also* JAMES M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL, LIBERTIES 30 (1956).

threat to the United States under the Alien Friends Act.[101] The Alien Enemies Act authorized the president to apprehend and deport aliens from countries at war with the United States.[102] Because of their unpopularity, the Alien and Sedition Acts were allowed to expire or were repealed by 1802.[103] Prior to expiration, President Jefferson pardoned those who had been arrested under the acts during the Adams administration.[104]

This law was applicable among the states, and effectively closed the loophole for immigrants to shop initial state residence destinations to find a quicker path to citizenship. It did not, however, close the borders or limit the number of immigrants who wanted to live in the country even without having the rights of citizenship.

With the Naturalization Law of 1802, Congress reestablished a five-year waiting period for immigrants trying to become citizens.[105] It also required immigrants to declare their intention to become citizens at least three years before applying for citizenship, to be free white persons, to renounce any allegiance to any foreign authority or sovereign, renounce all titles of nobility, and to take an oath of allegiance to the Constitution of the United States.[106] It also asked immigrants to prove to the court that during their period of residency in the United States that they "behaved as a man of good character" and were "attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same."[107] The Civil War, however, tempered much of the anti-immigrant policy that had developed in the 19th century. Labor shortages in the industrialized North led to passage of the Contract Labor Law of 1864, which allowed employers to recruit foreign workers and pay their transportation costs.[108] In exchange, these immigrants were contracted to work for no wages until they could repay the transportation costs the employer had incurred.

The California Gold Rush in 1848 initially mitigated a push for anti-immigrant policies in the West.[109] By 1852, California was home to 25,000 newly-arrived Chinese immigrants.[110] China and United States

101. Alien Friends Act of 1798, ch. 58, § 1 Stat. 570 (1798).

102. *Id.* ch. 66, § 1 Stat. 577.

103. Janet K. Levit, *Sedition*, in THE OXFORD COMPANION TO AMERICAN LAW 727, 728 (Kermit L. Hall ed., 2002).

104. *Id.*

105. Naturalization Law of 1802, ch. 28, § 1, 2 Stat. 153 (1802).

106. *Id.*

107. *Id.*

108. Contract Labor Law of 1864, ch. 246, § 4, 13 Stat. 385 (1864).

109. Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 J. ECON. HIST. 779, 780 (2005).

110. *Id.* at 781 (The Chinese immigrant population in California in 1852 "comprised 10 percent of the total non-Indian population and over 35 percent of the total foreign-born

then signed the Burlingame Treaty of 1868, which cleared the way for increased immigration and forbid forced emigration.[111]

By 1875, the transcontinental railroad was complete and the Civil War had ended, opening the way for the labor unions to begin fighting against the importation of cheap labor. By 1885 the unions were successful in prohibiting the importation of contracted labor with passage of the Foran Act, also known as the Alien Contract Labor Law.[112]

Prior to the Foran Act, but following the Supreme Court's ruling in *Henderson v. Mayor of New York* which held that administration of immigration law is a federal matter, [113] Congress had already passed the Immigration Act of 1875. This was the first restrictive federal legislation barring admission for certain classes immigrants.[114] Borrowing from colonial-era legislation, the 1875 statute prohibited the admission of convicts, prostitutes, or "cooly"[115] laborers into the country.[116] The statute was the first of a series of "quality control exclusions based on the nature of the immigrants themselves."[117]

The 1875 Act did not address the Chinese already in the country or those willing to immigrate to the United States on their own. In response to anti-Chinese sentiments, especially those arising in the then swing state of California, Congress passed the Chinese Exclusion Act of 1882.[118] This act created a 10-year prohibition on Chinese labor immigration. This was the first major law restricting immigration to the United States and the first ethnic-based prohibition of entry based on the premise that an

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population.").

111. Burlingame-Seward Treat, U.S.-China, July 28, 1868, 16 Stat. 739, art. V:

> The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes.

112. Alien Contract Labor Law of 1885, Pub. L. No. 48-164, 23 Stat. 332 (1885) (repealed 1952).

113. Henderson v. Mayor of City of New York, 92 U.S. 259, 273 (1875).

114. WEISSBRODT & DANIELSON, *supra* note 89, at 6.

115. Cooly was the term used to describe Chinese immigrants who entered the United States on a contract in which the immigrants would owe a monetary repayment. *See* Terry E. Boswell, *A Split Labor Market Analysis of Discrimination Against Chinese Immigrants, 1850–1882*, 51 AM. SOC. REV. 352, 358 (1986).

116. Immigration Act of 1875, ch. 141, §§ 3–5, 18 Stat. 477 (1875).

117. WEISSBRODT & DANIELSON, *supra* note 89, at 6.

118. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943). *See also* David E: Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 229 (1999).

influx of one ethnicity endangered the country's economic welfare.

Shifting focus south of the United States, the Mexican Revolution began in 1910 as a result of Mexico's elitist policies disfavoring the rural poor. The revolution led many Mexicans to flee their home country for the United States.[119] It has been proposed that many of these immigrants planned to return with greater financial security once the revolution ended.[120] However, the United States eventually forcefully repatriated more than 400,000 of these immigrants to Mexico.[121]

From 1907 until 1911, the Dillingham Commission was convened under the leadership of Vermont Senator William Paul Dillingham.[122] Formed in response to growing political concern about immigration in the United States, the Commission saw the rate of Southern and Eastern European immigrants as a threat to American culture and recommended reducing the number of immigrants allowed into the United States from those countries.[123] The Commission recommended greatly reducing the number of immigrants allowed in from those countries. In addition, the Commission further recommended that Congress enact a reading and writing requirement as a means of keeping "undesirable immigrants" out of the United States.[124]

Fulfilling the Commission's literacy test proposal, Congress went on to pass the Immigration Act of 1917 which prohibited the legal immigration of Asian laborers[125] over President Wilson's veto.[126] By 1919, with U.S. entry into World War I, xenophobia rose to even higher levels.[127] Suspected enemy aliens were deported and the first Red Scare spread across the country as fears of a left-wing Communist invasion increased.[128] The spread of the Red Scare also led to the nationwide Palmer Raids, which led to the arrest and deportation of those suspected of harboring Communist sympathies in November 1919 and January

119. U.S. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930: ABSTRACT OF THE CENSUS 130 (1932) (indicating the Mexican-born population in the United States grew from 221,915 in 1910 to 486,418 in 1920 and 641,462 by 1930).

120. Julia Spiegel & Ed McCarthy, *Immigration and History Workshop: A Brief Timeline of Key Events*, YALE LAW SCHOOL, http://www.law.yale.edu/documents/pdf/Clinics/immigration_History_Timeline.docUniversity.

121. Michael B. Katz et al., *The Mexican Immigration Debate: The View from History*, 31 SOC. SCI. HIST. 157, 166 (2007).

122. ASPIRATION, ACCULTURATION, AND IMPACT: IMMIGRATION TO THE UNITED STATES 1780-1930, *Dillingham Commission (1907–1910)*, http://ocp.hul.harvard.edu/immigration/dillingham.html (last visited Aug. 23, 2013).

123. *Id.*

124. COMM'N, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION 48 (1911).

125. Immigration Act of 1917, ch. 29, 39 Stat. 874 § 9 (1917).

126. *Id.*

127. Spiegel & McCarthy, *supra* note 120.

128. *Id.*

1920.[129] The end of Palmer Raids and the subsequent criticism of the civil rights abuses delivered during the raids did coincide with a consensual wane in the Red Scare.[130] The calm did not last long as a new fear of a pending "alien flood" stemming from the economic chaos in Europe re-elevated anti-immigrant sentiments in the United States.[131]

In response, the United States established what has become a forbearer to the modern quota system. The Emergency Quota Act of 1921 was the first quota system, but it was only enforced against Eastern Hemisphere countries.[132] The quotas were an attempt by the government to maintain U.S. Northern-European-based culture, and locked in the maximum number of permitted immigrants who could enter based on their country of origin.[133] The quotas varied in size from country to country, with the maximum cap corresponding to the number of persons from each country who were already living in the United States as shown in the census of 1910, one decade earlier.[134]

Just three years later, Congress implemented the National Origins Act in 1924.[135] This Act was the first permanent quota law in the United States and it established the preference quota system. The Act gave a quota preference to immediate family members of U.S. citizens and immigrants "skilled in agriculture."[136] The Act also recognized for the first time that wives and children of citizens would not count against the country of origin quotas. This allowed for a larger number for people of British descent with family already in the United States to immigrate, while specifically excluding Eastern Europeans without familial ties and Asians, who were ineligible for citizenship due to prior naturalization laws.[137]

Procedurally, the National Origins Act established the consular-based system in which hopeful immigrants had to register through a U.S. consular in their home country before entering the United States.[138] Following passage of the Act, Congress established the U.S. Border Patrol as the authority tasked with restricting access to the country by

129. Harlan Grant Cohen, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431, 1457 (2003).

130. *Id.* at 1465.

131. ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952, at 8 (1972).

132. Emergency Quota Act of 1921, 42 Stat. 5 (1921).

133. Spiegel & McCarthy, *supra* note 120.

134. DIVINE, *supra* note 131, at 5.

135. National Origins Act of 1924, 43 Stat. 153 (1924).

136. *Id.* § 6(a)(2).

137. Office of the Historian, U.S. Dep't of State, *The Immigration Act of 1924 (The Johnson-Reed Act)*, http://history.state.gov/milestones/1921-1936/ImmigrationAct (last visited Aug. 23, 2013).

138. National Origins Act, *supra* note 135, § 2.

those attempting to bypass the quota system.[139]

Quotas under the National Origins Act were also based on the 1890 U.S. population levels, but the 1924 Act's underlying approach actually restricted immigration from Eastern and Southern Europe even more than the Emergency Quota Act of 1921.[140] The annual quota levels were later adjusted to allow even greater numbers of immigrants from Great Britain before being made permanent in 1929.[141] The Great Depression would, however, all but stop immigration into the United States. From 1931 to 1936 there were nearly 300,000 more people leaving the country than entering it.[142]

Due to engagement in World War II, the United States was suffering from field worker shortages. Therefore, the United States negotiated a bilateral treaty with Mexico in 1942 to allow for an influx of Mexican farm workers into the United States.[143] The treaty formed the basis of what became the long-running Bracero Program.[144] One year later, Congress repealed the Chinese Exclusion laws of 1882.[145]

The open door policy that flourished during World War II ended with the enactment of the Immigration and Nationality Act in 1952.[146] Set against the anti-Communism backdrop that followed World War II, the Act passed with enough support to override President Harry Truman's veto.[147]

President Truman objected to the Act's isolationist tone reflected in the ideological exclusion provisions.[148] These provisions further restricted immigration from Asia but allowed for unlimited immigration from the Western Hemisphere countries.[149] The Act also gave legal immigration visa preferences to skilled workers, relatives of U.S. citizens, and resident aliens.[150] Finally, the Act strengthened the security screening standards already in place.[151]

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139. Department of Labor Appropriation Act of 1924, 43 Stat. 205, 240 (1924).

140. DIVINE, *supra* note 131, at 18 ("The 1924 law reaffirmed this earlier action [the rejection of the asylum ideal] and went further, for it substituted a belief in racial homogeneity for the other 19th-century ideal, the melting pot.")

141. *Id.* at 27.

142. *See generally* Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 187 (2010).

143. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 551 (2007).

144. Spiegel & McCarthy, *supra* note 120.

145. Magnuson Act of 1943, 57 Stat. 600 (1943).

146. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1557 (1990)).

147. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798–1965, at 307 (1981).

148. *Id.*

149. Immigration and Nationality Act, *supra* note 146, § 101(a)(27)(C).

150. *Id.* § 203.

151. *Id.* §§ 232–34.

Immigration enforcement became a principal concern during the latter half of 1954 when President Dwight Eisenhower's Attorney General Herbert Brownell implemented "Operation Wetback."[152] This federally led effort aimed to remove all of the illegal immigrants in the Southwest. From June 1954 through the end of 1954, the former Immigration and Naturalization Service (INS) was tasked with removing 3000 illegal immigrants from the country daily.[153] Yet, in January of 1955, the Border Patrol reported apprehensions of less than 250 per day.[154]

Starting in California and Arizona, the operation involved 800 Border Patrol agents setting up roadblocks, intercepting incoming trains, and conducting raids in industrial and agricultural areas.[155] Once apprehended, the illegal immigrants were deported to Mexico.[156] By the end of 1954, funding for "Operation Wetback" had run out and the program was stopped. In 1955, INS officials called the program a success, stating "the border has been secured."[157] The former INS claimed responsibility for 1.3 million deporations, although this final figure is estimated to include a large number of self-deportations as well.[158]

Preference quotas were not restricted to family members of current citizens and resident aliens either. For example, the United States issued 35,000 humanitarian visas for Hungarian refugees following the Hungarian uprising of 1956.[159] The Soviet Union's violent response to the failed revolution forced more than 200,000 refugees to flee.[160] Issuance of these postscript visas became the only possible show of support President Eisenhower could provide to the rebels without risking global war.[161]

Another milestone of U.S. immigration law was the passage of the Immigration and Nationality Act of 1965 (INA).[162] Notably, the Act removed the variability inherent in the national origin-based quota

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152. Herbert Brownell, Jr., Att'y Gen., U.S. Dep't of Justice, Address Before the Subcomm. on Immigration of Comm. on the Judiciary of the U.S. Senate (Apr. 13, 1956), http://www.justice.gov/ag/aghistory/brownell/1956/04-13-1956%20pro.pdf.

153. *Id.* at 6.

154. *Id.*

155. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT 31-32 (1954).

156. *Id.*

157. *Id.* at 15.

158. Fred L. Koestler, *Operation Wetback*, HANDBOOK OF TEXAS ONLINE http://www.tshaonline.org/handbook/online/articles/pqo01 (last visited Aug. 23, 2013).

159. Guy E. Coriden, *Cent. Intelligence Agency, Report on Hungarian Refugees*, at 85 (1958).

160. *Id.* at 88.

161. John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 850–52 (1982).

162. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. § 1101).

system.[163] Intead, the Act granted a maximum annual total of 170,000 immigration visas.[164] Per-country limits were set across the board at 20,000 total from any Eastern Hemisphere country.[165] However, there were still no limits placed on immigrants from Western Hemisphere countries.[166]

The Bracero Program also ended in 1964 as the influx of agricultural workers immigrating illegally and outside of the Bracero Program grew, and as journalists, including the renowned broadcaster Edward R. Morrow, reported human rights abuses against braceros.[167] Morrow's television documentary "Harvest of Shame" presented the conditions Mexican Laborers lived under as a result of the Bracero Program and was instrumental in raising the public's awareness of the abuses in the system.[168]

Congress first amended the INA in 1976, extending the per-country limits to Western Hemisphere countries.[169] The extension of a 20,000 visa limit to the Western Hemisphere had a direct impact on Mexican immigrants.[170] In 1978, the INA was amended to set the single annual worldwide visa limit at 290,000 and to prohibit U.S.-born children from petitioning for their immigrant parents' entry.[171]

By 1980, the United States was under international pressure to conform its policies to the U.N. Convention relating to the Status of

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163. *Id.* at 11–12.

164. *Id.* § 201.

165. *Id.* § 202.

166. *Id.*

167. *Mexican Immigrant Labor History*, PUBLIC BROADCASTING SERVICE, http://www.pbs.org/kpbs/theborder/history/index.html (last visited Aug. 23, 2013).

168. *CBS Reports: Harvest of Shame* (CBS television broadcast Nov. 25, 1960).

169. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2704 (1976).

170. Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1607 (2005):

> In 1976, an annual country quota of 20,000 on Mexico was implemented. We can track the relation between this numerical restriction of legal immigration from Mexico and illegal immigration. In the early 1960s, the annual legal migration of Mexicans to the United States approximated 200,000 braceros and 35,000 admissions for permanent residence. The number of deportations of undocumented Mexicans increased by 40% in 1968 (the year the 120,000 quota for the Western Hemisphere was implemented) to 151,000. In 1976 (the year the 20,000 country quota for Mexico was implemented), the INS expelled 781,000 Mexicans from the United States. Meanwhile, the total number of apprehensions for all other nationals in the world, combined, remained below 100,000 a year.

171. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 1, 92 Stat. 907, 907 (1978) (codified as amended at 8 U.S.C. § 1151(a) (Supp. V 1981)).

Refugees.[172] In this, the United Nations defined "refugees" as an individual who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[173]

In response, the United States created an asylum system by enacting the Refugee Act.[174] The Act further permitted the President to cap the annual number of admitted refugees.[175]

The most notable modern reform to the U.S. immigration system occurred in 1986 with the Immigration Reform and Control Act (IRCA).[176] This comprehensive reform provided legal citizenship to undocumented aliens who had resided in the United States unlawfully since January 1, 1982. It also prohibited employers from knowingly hiring or recruiting undocumented employees.[177]

IRCA further created a new classification for legal temporary special agricultural workers (SAW).[178] The former INS estimated that it would receive 600,000 SAW applications,[179] but in the end it provided amnesty to more than 1,200,000 seasonal agricultural workers.[180] In total nearly 2.7 million illegal immigrants are reported to have received amnesty under IRCA.[181]

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172. Spiegel & McCarthy, *supra* note 120.

173. Convention Relating to the Status of Refugees, Geneva, Switz., July 28, 1951, 189 U.N.T.S. 137, 152.

174. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 § 208 (1980) (codified at 8 U.S.C. § 1158).

175. *Id.* at § 207 (codified at 8 U.S.C. § 1157).

176. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IRCA].

177. *Id.*; *See also Immigration Reform and Control Act of 1986 (IRCA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca (last visited Aug. 23, 2013).

178. IRCA, *supra* note 176, § 1160(a) (entitled "Special Agricultural Workers").

179. Associated Press, *U.S. Amnesty Ends for Farm Workers*, N.Y. TIMES, Dec. 1, 1998, http://www.nytimes.com/1988/12/01/us/us-amnesty-ends-for-farm-workers.

180. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: AN INVESTIGATION OF THE INS'S CITIZENSHIP USA INITIATIVE OF FISCAL YEAR 1996, at 176 (2000).

181. *See* Gene Demby, *Lessons Learned From 1986's Path to Citizenship*, NATIONAL PUBLIC RADIO (Apr. 10, 2013, 5:13 PM), http://www.npr.org/blogs/codeswitch/2013/04/10/176818128/lessons-learned-from-1986s-path-to-citizenship.

More SAW immigrants received amnesty under IRCA than was expected due to the development of a black market that provided residency and work documents.[182] Aliens who otherwise did not qualify for amnesty because they had not lived in the United States before 1982 were able to purchase counterfeit documents that would then qualify them for amnesty.

The Border Patrol also grew. In the first five years of the 1980s, the Border Patrol consistently employed roughly 2,000 agents.[183] Following the passage of IRCA, the number of agents grew to nearly 10,000 in the 15 years prior to the attacks of September 11, 2001.[184] In fact, the United States has spent $187 billion on post-IRCA border enforcement.[185] By 2012, annual immigration enforcement funding exceeded the budgets available to the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Drug Enforcement Administration, and the Secret Service combined.[186]

However, enforcement of IRCA's employer sanctions was minimal.[187] A look into the former INS efforts following IRCA shows that by 1999 the agency was still allocating a disproportionate amount of resources to border enforcement as opposed to interior enforcement.[188] In New Mexico, for example, the Honorable Robert C. Brack, U.S. District Judge, has sentenced more illegal immigrant defendants than any other judge in the country, however, he has not sentenced one employer defendant.[189]

Unlike evidence of the black market created for amnesty documents,

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182. OFFICE OF THE INSPECTOR GENERAL, *supra* note 180, at 20.

183. MARC R. ROSENBLUM, CONG. RESEARCH SERV., RL42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 15 (2012).

184. *Id.*; *see also* U.S. Border Patrol, Border Patrol Agent Staffing by Fiscal Year (2012), *available at* http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/staffing_1993_2012 (indicating that in the decade following the attacks of September 11, 2001, the number of Border Patrol Agents increased again from 9,821 in 2001 to 21,444 in 2011).

185. DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINE 12 (2013).

186. *Id.* at 9.

187. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION INFORMATION SOURCE (Sept. 1, 2005), http://www.migrationpoliycv.og/article/declining-enforcement-employer-sanctions.

188. *Immigration Enforcement—Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts: Testimony Before Subcomm. on Immigration, Border Security and Citizenship of S. Comm. Of the Judiciary*, 109th Cong. 3–4 (2006) (statement of Richard M. Stana, Director of Homeland Security and Justice), *available at* http://www.gao.gov/assets/120/114113.pdf (detailing that in 1999 the INS devoted just 9% of its total investigative efforts to worksite enforcement).

189. Miriam Jordan & Joe Palazzolo, *Border Laws Put Judge on Map*, WALL ST. J. (May 13, 2013), http://online.wsj.com/news/articles/SB10000142412788732333610457849948010 8652610.

there is little statistical verification that IRCA's immigration enforcement provisions created any long-term effects that lead to the estimated 12 million illegal immigrants in the United States by 2008.[190]

Not long after IRCA's passage, the Immigration Act of 1990 more than doubled the worldwide quota ceiling, raising it from 290,000 to 700,000 annually.[191] The Act also included a diversity lottery program to address those countries that once figured prominently in the numbers of incoming legal immigrants but had become under represented by the late 20th century.[192] With the creation of the preference quota system, families of immigrants two generations or older were no longer eligible for a family-related visa.[193] To address this situation, the diversity lottery, also known as the Green Card Lottery, provides 50,000 visas annually to nationals from "adversely affected" countries.[194] Those born in any territory that has sent more than 50,000 immigrants via family-sponsor, employment or immediate relative preferences to the United States in the previous five years are not eligible to receive a diversity visa.[195] The State Department lists both the "adversely affected" eligible countries and the ineligible countries for diversity lottery purposes.[196] Currently the ineligible list includes: Bangladesh, Brazil, Canada, China, Columbia, Dominican Republic, Ecuador, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, South Korea, United Kingdom, and Vietnam.[197]

While second and third generation family members are not able to receive a family visa, family reunification has remained a major focus in U.S. immigration policy and the 1990 Act retained family reunification as a major path to entry.[198] The Act also more than doubled the number of employment-related immigration visas.[199]

The Illegal Immigration Reform and Immigrant Responsibility Act of

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190. D'Vera Cohn & Jeffrey S. Passel, A Portrait of Unauthorized Immigrants in the United States, Pew Research Hispanic Trends Project (Apr. 14, 2009), http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/ (citing a Pew Hispanic Center survey finding that 59% of the undocumented aliens in the United States in 2008 were from Mexico, 11% were from Central America, 11% were from Asia and less than 2% were from the Middle East).

191. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (codified at 8 U.S.C. § 1153).

192. *Id.* §§ 131–62, 104 Stat. 4997–5012 (codified at 8 U.S.C. § 1153(c)).

193. *Id.*

194. *Id.* §§ 131–32, 104 Stat. 4978, 4997–5000.

195. *Id.* § 131, 104 Stat. 4997–99.

196. *See generally* BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, INSTRUCTIONS FOR THE 2014 DIVERSITY IMMIGRANT VISA PROGRAM (DV-2014) (2012), *available at* http://travel.state.gov/pdf/DV_2014_Instructions.pdf.

197. *Id.*

198. Immigration Act of 1990, *supra* note 191, § 111 (codified at 8 U.S.C. 1153).

199. *Id.* § 121, 104 Stat. 4987–90 (codified at 8 U.S.C. 1153).

1996 (IIRIRA) placed restrictions on the ability of immigrants to gain legal status and expanded the list of deportable crimes.[200] Signed by President Bill Clinton, the IIRIRA created more stringent immigration admission laws but also replaced the previous judicial review system of removal decisions made by the Attorney General.[201]

President Clinton also signed the Welfare Reform Act of 1996, which disqualified even legal immigrants from federal entitlement programs.[202] The Act "barred states from giving federally funded TANF [Temporary Assistance to Needy Families] to newly arriving aliens (other than refugees/asylees) for the first 5 years of residence."[203] Aliens with a "substantial U.S. work history or military/veteran connection" were exempted from the TANF ban.[204] The Act similarly banned issuance of food stamps and Supplemental Security Income (SSI), and constrained Medicaid eligibility to aliens, regardless of their arrival date.[205] Amendments in 1997 and 1998 restored SSI, Medicaid, and food stamp eligibility to many aliens who were in the United States when the law was enacted.[206]

In the 1990s, federal legislation refined the requirements for many aliens seeking a temporary worker visa.[207] Specifically, the H-1B visa was created to fill short-term employer needs for qualified professionals.[208] Before 1990, any "professionals and persons of exceptional ability in the sciences and arts" were eligible for the H-1B visa.[209] The Immigration Act of 1990, however, reclassified artists out of the H visa category and limited the H-1B to persons working in specialty occupations requiring "theoretical and practical application of a highly specialized body of knowledge."[210] Once issued, an H-1B visa lasts three

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200. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

201. David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75, 76–77 (2007) (indicating that following "five years of litigation," the U.S. Supreme Court concluded that the "[district courts or the courts of appeals] retained jurisdiction in light of AEDPA and IIRIRA to review deportation and removal orders.").

202. *See generally* Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996) (codified as amended in 42 U.S.C. §§ 7, 8, 21, 25). *See also* Spiegel & McCarthy, *supra* note 120.

203. VEE BURKE, CONGRESSIONAL RESEARCH SERVICE, WELFARE REFORM BRIEFING BOOK, THE 1996 WELFARE REFORM LAW, *available at* http://royce.house.gov/uploadedfiles/the%201996%20welfare%20reform%20law.pdf (last updated July 2003).

204. *Id.*

205. *Id.*

206. *Id.*

207. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

208. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994).

209. WEISSBRODT & DANIELSON, *supra* note 89, at 159.

210. *Id.*

years and can be renewed for a second three-year period for a maximum of six years.[211] Following the 1990 Act, the H-1B visa holder no longer had to maintain a foreign residence.[212] Instead, H-1B status was exempted from the presumption that they intend to return to their home country, thereby making it possible for them to seek permanent resident status without violating the terms of their visa.[213]

By 1997, annual demand for H-1B visas from persons working in "specialty occupations" exceeded the 65,000 limit.[214] Petitions under the H-1B program are processed according to the federal fiscal year running from October 1 through September 30, but in 1998 the 65,000 cap had been filled by May 11.[215] The early demand for visas left a nearly five-month period when computer and engineering employers especially were unable to hire foreign temporary workers. As a result, Congress subsequently provided for an increasing annual cap for 1999 and again raised the cap in 2000. By 2003, the number of H-1B visas awarded had grown to 195,000.[216]

With the end of the dot-com era and amid a weakened economy, Congress let the H-1B limit revert back to its 65,000 cap after 2003. By February, however, the 65,000 cap had been reached.[217] By 2012, it took employers just two months to fill the 65,000 cap. In 2013, the H-1B visa race ended in just five days.[218]

Other countries like Australia, Brazil, Canada, Chile, China, Germany, India, Israel, Singapore, and Switzerland are now directly recruiting U.S. trained PhD's who will not be able to stay in the United States once their student visa expires.[219] According to the Brookings Institute, more than 45% of all science, technology, and math PhDs in the United States were awarded to foreign-born students.[220] Further, the Massachusetts Institute of Technology's Deshpande Center for Technical Innovation has reported that the United States pays for at least 80% of the

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211. *Id.* at 162.

212. *Id.*

213. *Id.*

214. *Id.* at 160.

215. George N. Lester IV, *Specialty Occupation Professionals*, *in* BUSINESS IMMIGRATION LAW: STRATEGIES FOR EMPLOYING FOREIGN NATIONALS 4-22 (Rodney A. Malpert & Amanda Petersen, eds.) (13th ed. 2007).

216. WEISSBRODT & DANIELSON, *supra* note 89, at 160.

217. *Id.*

218. Neil G. Ruiz & Jill H. Wilson, *A Balancing Act for H-1B Visas*, THE BROOKINGS INSTITUTION (Apr. 18, 2013), http://www.brookings.edu/research/articles/2013/04/18-h1b-visa-immigration-ruiz-wilson.

219. *See* Kevin Sullivan, *Other Countries Court Skilled Immigrants Frustrated by U.S. Visa Laws*, WASH. POST (Feb. 18, 2013), http://articles.washingtonpost.com/2013-02-18/national/37159067_1_visa-system-student-visas-highly-skilled-foreigners.

220. ADAM LOONEY & MICHAEL GREENSTONE, THE HAMILTON PROJECT, THE BROOKINGS INSTITUTION, A DOZEN ECONOMIC FACTS ABOUT INNOVATION 17 (2011).

school's graduate research, or $200,000 of the $250,000 total per student.[221]

Not everyone agrees with the idea that increasing these STEM (Science, Technology, Engineering, and Mathematics) visas is a good idea. Opposition comes from traditionally liberal and conservative voices alike. For example, both *Mother Jones* and the *Wall Street Journal* have reported on the dangers of increasing STEM visas. *Mother Jones* reports that, while foreign-born entrepreneurs have started 40% of U.S. technology sector firms, today the majority of H-1B visa holders never intend to stay in the country.[222] Rather, the visas go to offshore outsourcing firms who bring in groups of foreign workers for a limited time to teach them the positions they are shipping overseas. The article cites *Computer World* as having reported that half of the 65,000 H-1B STEM visas go to such firms currently, and that only 3% of these visa holders, or 1950 people, ever apply for permanent citizenship.[223]

In the *Wall Street Journal*, Dr. Peter Cappelli, a professor at the University of Pennsylvania's Wharton School, highlights another somewhat common refrain opposing the technology sector's efforts to lobby for an increase in H-1B STEM visas.[224] Dr. Cappelli argues that there is not a lack of skilled U.S. citizen workers available, but that there is a lack of U.S. citizens skilled to do these jobs at the wages being offered.[225] He then makes the case that the technology industry can choose to educate and train low skilled workers on the job to keep wages low.[226] If not, they would necessarily need to raise wages to attract applicants who have taken on the financial burden of attending graduate programs.[227] Other newspapers have also reported that the numbers of STEM graduates needed is overestimated and that the H-1B program does cause wage depression in the tech industry.[228]

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221. Sullivan, *supra* note 219.

222. Josh Harkinson, *How H-1B Visas Are Screwing Tech Workers*, MOTHER JONES (Feb. 22, 2013), http://www.motherjones.com/politics/2013/02/silicon-valley-h1b-visas-hurt-tech-workers.

223. *Id.* (citing Patrick Thibodeau & Sharon Machlis, *The Data Shows: Top H-1B Users are Offshore Outsourcers*, COMPUTERWORLD (Feb. 14, 2013), http://www.computerworld.com/s/article/9236732/The_data_shows_Top_H_1B_users_are_offshore_outsourcers)).

224. Peter Cappelli, *Why Companies Aren't Getting the Employees They Need*, WALL ST. J. (Oct. 24, 2011), http://online.wsj.com/article/SB10001424052970204422404576596630897409182.html?mod=WSJ_Careers_CareerJournal_5.

225. *Id.*

226. *Id.*

227. *Id.*

228. *See, e.g.*, Walt Gardner, *Tech Firms Invent Shortage Panic*, ATL. J. CONST. (Nov. 9, 2009), http://www.ajc.com/news/news/opinion/tech-firms-invent-shortage-panic/nQY5b (reporting that the numbers underneath the call for an increase in STEM visas do not actually support the contention that there are not enough citizen STEM workers already in the United States); *see also* Adam Davidson, *Skills Don't Pay the Bills*, N.Y. TIMES (Nov. 20, 2012),

Another noteworthy problem regarding the H-1B visa is that it lasts only six years instead of offering full citizenship. Foreign entrepreneurs receive their degrees at U.S. universities are then forced to return to their home country after their six-year visa expires.[229] However, it is possible that the successful entrepreneurs might be able to apply for and receive an EB-5 visa after their H-1B visa expired.[230]

Currently 10,000 EB-5 visas are available each year and they offer lawful permanent residence for foreign entrepreneurs who create jobs in the United States.[231] To receive one, the applicant must invest one million dollars in the start up of a new business or $500,000.00 if the business is located in a rural area. In addition, they must hire a minimum of 10 U.S. citizen workers, but the hires cannot be related to the visa holder.[232] Senator Jerry Moran of Kansas introduced a 2012 bill, Startup Act 2.0, which proposed to increase the number of EB-5 visas by 75,000, aimed to increase the number of H-1B visas by 50,000, and tie them both to a path to permanent residency.[233] Senator Moran has now reintroduced the bill as Startup Act 3.0, which only requires a $100,000.00 investment from the entrepreneur with a two-person hire requirement the first year and a five-person hire requirement within three years.[234]

Senator Moran's Startup Acts have been criticized as creating the potential for future entrepreneurs to game the system by creating phony businesses in order to gain citizenship. Republican U.S. Congressman Lamar Smith of Texas disparaged the initial bill for those very reasons, saying, "such a program could be susceptible to fraud and abuse. How is the government to determine which economic vision is feasible and which is pie in the sky? How will it root out schemes proposed simply to procure a visa?"[235]

Congressman Smith's own STEM visa bill has received more attention than Moran's Startup Act 3.0 bill. Smith's House bill was passed in 2012 and calls for 55,000 more STEM visas for PhD's from

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http://www.nytimes.com/2012/11/25/magazine/skills-dont-pay-the-bills.html (reporting that employers do not want to hire citizen STEM graduates because they won't work for the same, lower rates as foreign STEM graduates).

229. 8 U.S.C. § 1184(g)(4).

230. *Id.* § 1153(b)(5).

231. INA § 203(b)(5), 8 U.S.C. § 1153(b)(5) (providing that up to 7.1% of worldwide employment-based immigrant visas, about 10,000, are available each year to alien investors meeting the standards for EB-5 visa category).

232. 8 C.F.R. § 204.6 (2012) (specifying the standards for the EB-5 visa category).

233. Startup Act 2.0, S. 3217, 112th Cong. §§ 3, 4 (2012).

234. Startup Act 3.0, S. 310, 113th Cong. § 4 (2013).

235. *Investor Visa Program: Key to Creating American Jobs: Hearing Before the Subcomm. on Immigration Policy and Enforcement*, 112th Cong. 4 (2011) (statement of Rep. Lamar Smith, Chairman, Comm. on the Judiciary).

U.S. research universities.[236] It also removes 55,000 diversity green cards from the pool given out to nations that have had a low-rate of immigration to the United States over the previous five years.[237] A Democrat-led version of the same House bill would have increased the STEM visas to 55,000 without any offset elsewhere.[238]

The White House opposed the 2012 Republican bill. However, in January 2013 Senators Orin Hatch, Marco Rubio, and the remaining "gang of eight" senators introduced the Border Security, Economic Opportunity, and Immigration Modernization Act.[239] The gang of eight's bill seeks to increase the number of annual STEM visas by 55,000, nearly doubling the current level of 60,000, with the possibility of growing future STEM visa allocations all the way to 300,000 annually.[240] The gang of eight's bill does not include an increase in EB-5 visas as the Startup Act did. Instead, the total number of visas allocated each year would be tied to the unemployment rate.[241] Tying the number of visas to unemployment would then allow the U.S. Citizenship and Immigration Services to decrease the number, theoretically, even below the 55,000 threshold, if unemployment increases. In addition, for each H1-B visa holder a company employs the company would be required to invest $1,000.00 into STEM education/training programs for American citizens.[242]

While the Senate passed the bill on June 27, 2013, House opposition to the bill has been developing, and currently it is doubtful that the House will even vote on the comprehensive legislation package.[243] If Congress increases STEM visas, it may be putting its fingers on the market's competitive scale rather than fixing an immigration problem. As conservative think tanks like the John William Pope Center for Higher Education Policy have argued, the increased number of foreign STEM students has created a glut of supply from which employers may choose and has depressed wages.[244] As the liberal, labor union-associated

236. STEM Jobs Act of 2012, H.R. 6429, 112th Cong. (2012) (as passed by House, Nov. 30, 2012).

237. *Id.* § 3.

238. BRAINS Act, S. 3553, 112th Cong. § 2 (2012).

239. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

240. *Id.* § 4101.

241. *Id.* § 4101(a)(4)(C)(ii).

242. *Id.* § 4104.

243. *See* Lauren Fox, *Immigration Reform Could Boost U.S. Economy*, U.S. NEWS & WORLD REP. (Aug. 20, 2013), http://www.usnews.com/news/articles/2013/08/20/immigration-reform-could-boost-us-economy (reporting that "House Speaker John Boehner has stated he won't bring the Senate bill to floor, but will instead count on his committee leaders to work on legislation piece by piece.").

244. Jay Schalin, *The Myth of STEM Labor Shortages*, JOHN WILLIAM POPE CENTER FOR

Economic Policy Institute has argued, technology firms lobbying for more H-1B visas, such as Microsoft are attempting to bring in cheaper technology labor instead of providing training to the available market of workers available.[245]

V. HISTORY OF THE UNITED STATES-MEXICO BORDER

While there is no federal crime that makes it illegal for foreign nationals to be in the United States, there is a misdemeanor for improper entry by an alien.[246] There are felonies for illegal re-entry after being deported.[247] The severity of sentence for these re-entry felonies increases significantly if the re-entry occurs after the alien has committed a felony.[248] As a result, almost everyone who has illegally re-entered could be charged with a misdemeanor at the least, but may face much higher charges. There is a considerable amount of prosecutorial discretion associated with this offense. Those who get charged criminally, whether here legally or illegally, alien or citizen, receive all rights afforded under the constitution including having an attorney appointed to represent them.[249]

In 1987, when the Honorable James Parker, now Senior U.S. District Judge, first came onto the bench as an appointee of President Ronald Reagan, his recollection is that he saw roughly four immigration cases a year.[250] He was sentencing many Mexican nationals for bringing drugs into the United States, but not sentencing many Mexican nationals for re-entry crimes. Today, of course, while the federal courts are continuing to sentence a lot of Mexican nationals for bringing drugs into the country, they are also sentencing many more defendants for immigration-related offenses.

For example, in 1997, the District of New Mexico had 723 criminal defendants, of which 240 were charged with illegal re-entry.[251] In 2003,

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HIGHER EDUCATION POLICY (May 31, 2012), http://www.popecenter.org/commentaries/article.html?id=2701.

245. Daniel Costa, *STEM Labor Shortages? Microsoft Report Distorts Reality About Computing Occupations*, ECONOMIC POLICY INSTITUTE (Nov. 19, 2012), http://www.epi.org/publication/pm195-stem-labor-shortages-microsoft-report-distorts/.

246. 8 U.S.C. § 1325 (2006).

247. *Id.* § 1326.

248. *Id.* § 1326(b)(1)–(2).

249. Plyler v. Doe, 457 U.S. 202, 215 (1982) ("[T]he protections of the Fourteenth Amendment extend to anyone, citizen or stranger, who is subject to the laws of a State . . .").

250. Interview with The Honorable James Parker, Senior U.S. District Judge, District of New Mexico, in Albuquerque, N.M. (Oct. 5, 2013).

251. U.S. COURTS, U.S. DISTRICT COURT – JUDICIAL CASELOAD PROFILE: NEW MEXICO (1997), http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2004.pl [hereinafter JUDICIAL CASELOAD PROFILE: NEW MEXICO].

the Border Patrol was catching aliens and releasing them 25 to 30 times before the Department of Justice (DOJ) would ever charge them with a misdemeanor or felony.[252] When the DOJ did decide to charge them, they would usually charge a misdemeanor or two before they would ever charge a felony.[253] The exception would be if the alien had a criminal history in the United States.[254] That year, the District of New Mexico had 2361 new criminal filings, and 1473 were immigration cases.[255] In 2004, the District of New Mexico had 1502 immigration cases,[256] and in 2005, the number rose to 1826 immigration filings.[257] By 2009, the District of New Mexico had reached a height of 2738 immigration cases.[258] More recently, in 2012, the District of New Mexico had 3111 criminal defendants and 2186, or just more than two-thirds of all the criminal defendants, were charged with illegal re-entry.[259]

One reason the court's immigration caseload rose by more than 300 cases from 2004 to 2005 was the political efforts that were being made to change immigration laws. Early in the second term of the Bush administration, on July 6, 2005, at the Hyatt Regency Tamaya Resort, on the Santa Ana Pueblo in northern New Mexico, there was a border conference.[260] Included in the meeting were U.S. District Judges, U.S. Attorneys, and Federal Public Defenders from along the Mexican border.[261] The conference was with U.S. Attorney General Alberto Gonzales, and in a private, closed-door meeting, the Attorney General told a group that included Judge Browning and other federal officials that the Bush Administration would not close the border.

At the time, Attorney General Gonzales's statement seemed like valuable, inside information to some of us present that day. The Bush administration, however, had not kept its plans completely secret. A few months earlier, the President had signed the Security and Prosperity Partnership of North America with Mexico's President, Vicente Fox, and

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252. This is a general impression from Judge Browning's time on the federal bench in the District of New Mexico. Prosecutorial discretion in charging and trying immigration-related offenses has been in use for nearly forty years. *See generally* Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

253. *Id.*

254. *Id.*

255. JUDICIAL CASELOAD PROFILE: NEW MEXICO, *supra* note 251.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *See* Anna Macias Aguayo, *AG Gonzales Talks About Border, Court Vacancy*, ASSOCIATED PRESS (July 6, 2005), *available at* http://www.abqjournal.com/news/metro/apgonzales07-06-05.htm.

261. *Id.*

Canada's Prime Minister, Paul Martin.[262] The agreement was issued with a joint statement indicating the three countries "must develop new avenues of cooperation that will make our open societies safer and more secure, our businesses more competitive, and our economies more resilient."[263] Each country further agreed to set up working groups that would address the streamlining and securing of the countries' shared borders.[264] Some commentators took this agreement as a sign that the Bush administration was in fact planning on opening the borders in an attempt to create a North American equivalent to the European Union.[265]

In 2005, Senators John McCain and Ted Kennedy co-sponsored a Senate bill to overhaul immigration called The Secure America and Orderly Immigration Act. It was introduced to the Senate in May 2005 but was never voted on.[266] Senator Arlen Specter subsequently sponsored the Comprehensive Immigration Reform Act of 2006,[267] and Senator Harry Reid then sponsored the Comprehensive Immigration Reform Act of 2007.[268] Both of these acts were based on compromises made to the 2005 McCain-Kennedy bill.[269] The Senate passed the 2006 bill, but it was defeated in the House.[270] Senator Reid's 2007 bill achieved even less success, never making it through conference committee.[271]

Despite the Kennedy-McCain bill's bipartisan backing and support from President Bush, the large-scale impact of its provisions never made it out of committee either. Among those provisions was a path to citizenship for those illegal aliens already living in the United States.[272] The bill called for the enactment of the DREAM Act (Development, Relief, and Education for Alien Minors), which would have granted conditional temporary residency for undocumented immigrant minors. These minors were required to have arrived here as minors, lived in the country for five years, and after graduating from high school, went on to attend college or serve in the military (the same process has been outlined

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262. U.S. DEP'T OF STATE, FACT SHEET: SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA (Mar. 23, 2005) http://2001-2009.state.gov/p/wha/rls/fs/2005/69843.htm.

263. *Id.*

264. *Id.*

265. *See Lou Dobbs Tonight* (CNN television broadcast June 21, 2006) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0606/21/ldt.01.html).

266. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/bdquery/s?d109:S.1033.

267. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., *available at* https/www.govtrack.us/congress/bills/109/s2611#overview.

268. Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong., *available at* http://www.govtrack.us/congress/bills/110/s1348#overview.

269. Secure America and Orderly Immigration Act, *supra* note 266.

270. Comprehensive Immigration Reform Act of 2006, *supra* note 267.

271. Comprehensive Immigration Reform Act of 2007, *supra* note 268.

272. Secure America and Orderly Immigration Act, *supra* note 266, § 306.

in a separate, more recent bill introduced in 2009 by Senator Richard Durbin and Representative Howard Berman).[273]

After the Kennedy-McCain bill failed, President Bush appears to have concluded in his May 15, 2006, "Address to the Nation on Immigration," that until the United States secured the border with Mexico, Congress and the nation would not be willing to pass comprehensive immigration legislation.[274] So began the closing of the United States-Mexico border. To test its theory, the administration increased the size of the Border Patrol, called on the National Guard, and began building 700 miles of fence at different points along the nearly 2000-mile border with Mexico.[275]

Additionally, under the Department of Homeland Security's Operation Streamline, it appeared as though the DOJ was charging everyone who came into the United States illegally with either a misdemeanor or felony.[276] The early Obama administration made the same assessment and continued to charge everyone who came to the United States illegally with a crime. Recently however, there appears to have been a change to this policy.[277] First, some of the re-entry defendants the District Court now sees have already been deported once or twice before being charged.[278] Then, when they are caught after returning to the United States, they are charged.[279] Second, the Obama administration has also changed its policy on deportation of immigrants who come to the United States at an early age.[280]

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273. *Id.* § 701; *see also Basic Information About the Dream Act Legislation*, Dream Act Portal, http://dreamact.info/students (last updated July 16, 2010).

274. Selected Speeches of President George W. Bush 2001–2008, at 369, http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf.

275. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006); *see also* David Stout, *Bush Signs Bill Ordering Fence on Mexican Border*, N.Y. TIMES (Oct. 26, 2006), http://www.nytimes.com/2006/10/26/washington/27fencecnd.html.

276. *See* MARC R. ROSENBLUM, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 9–10 (2012) ("Operation Streamline has been described as a zero tolerance program leading to prosecutions for 100% of apprehended aliens . . .").

277. *McCain, Flake Question DOJ's Plan to End Operation Streamline*, ARIZONA DAILY INDEPENDENT (Sept. 10, 2014), http://www.arizonadailyindependent.com/2014/09/1/mccain-flake-question-doj-operation-streamline; Amanda Sakuma, *Feds Easing Back on Some Operation Streamline Prosecutions*, MSNBC (Sept. 24, 2014, 2:32 PM), http://www.msnbc.com/msnbc/feds-easing-back-some-operation-streamline-prosecutions.

278. *See, e.g.*, United States v. Mercado-Moreno, No. CR 12-0252 JB, 2012 WL 3150438, at *5 (D.N.M. July 18, 2012); United States v. Almendares-Soto, No. CR 10-1922 JB, 2010 WL 5476767, at *13 (D.N.M. Dec. 14, 2010).

279. *See, e.g., Mercado-Moreno*, 2012 WL 3150438, at *2; *Almendares-Soto*, 2010 WL 5476767, at *2.

280. U.S. CITIZENSHIP AND IMMIGRATION SERV., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (2012), http://www.uscis.gov/portal/site/uscis/.

There are also changes that have to do with the fast-track program. In the PROTECT Act of 2003,[281] Congress gave the U.S. Attorney for each district the authority to create a fast-track or early disposition program for criminal cases.[282] Under a fast-track program, the defendant receives a downward departure of 1 to 4 levels if they accept an early plea.[283] In the District of New Mexico, a defendant charged with the felony of illegal re-entry could get a three-level departure if he has not committed a violent crime.[284] If he had committed a violent crime in his past, he could still get a one-level departure.[285]

As an example of the pre-fast-track sentencing structure, if the defendant was here illegally and committed a drug-trafficking crime in 2003, his base offense level would be at 8 for the crime of re-entry with a 12-level enhancement for the drug trafficking crime.[286] His offense level of 20 would have been reduced three levels if he accepted responsibility, leaving him with an offense level of 17.[287] With a criminal history at level II, the guideline range for his sentence would have been 27 to 33 months.[288] When the judicial author of this Article came onto the bench in 2003 before *Blakely v. Washington*[289] and *United States v. Booker*,[290] which turned the previously mandatory sentencing guidelines into advisory sentencing guidelines, the criminal offender mentioned above would have received a sentence of 27 months.

Starting on October 24, 2003, the District of New Mexico began following the fast-track program.[291] Under the fast-track program, the same defendant as above would have received an extra three-level downward departure for accepting the plea early.[292] As a result, his offense level would have been reduced to 14, and with a criminal history at level II, the guideline range would call for a sentence between 18 and

281. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

282. *Id.* § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (codified as amended at 28 U.S.C. § 994 (2006)).

283. *Id.*

284. U.S. SENTENCING COMMISSION GUIDELINES MANUAL (2013), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf [hereinafter GUIDELINES MANUAL].

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Blakely v. Washington, 542 U.S. 296 (2004).

290. *See* United States v. Booker, 543 U.S. 220 (2005).

291. Memorandum from James B. Comey, Deputy Attorney General, U.S. Dep't Justice, Authorization of Early Disposition Programs (Oct. 29, 2004), *reprinted in* 21 Fed. Sent. Rptr. (Vera) 322, 323 (2009).

292. GUIDELINES MANUAL, *supra* note 284.

24 months.[293]

Then, in early 2012, the DOJ decided to standardize the fast-track programs across all districts.[294] If a U.S. Attorney wants to implement a fast-track program, he or she has to use the one the DOJ drafts.[295] Before this, the U.S. Attorney for each district could tailor the program he or she implemented to the individual district. For the District of New Mexico, this individualization meant that the same defendant as above would no longer get a four-level downward departure, but instead would get only the three-level departure implemented in 2003. With an offense level of 13 and criminal history still at II, the sentence range for this particular post-2012 defendant would now be between 15 and 21 months. The District went from a typical sentence of 27 months in early 2003 to a 15-month sentence in 2013.

Adding some complexity to the discussion is that some districts can and do choose to not implement a fast-track program at all.[296] As a result, sentences in the District of New Mexico tend to be lower than the sentences in those districts. Moreover, in some districts, not every defendant would be charged with a felony. In fact, most are charged with misdemeanors, so those other districts charging misdemeanor will likely impose shorter sentences than New Mexico's felony sentences. There has been a steady downward pressure on sentences for illegal re-entry, especially in the border districts, but it is possible that in non fast-track districts, the prosecutor's decision to charge the illegal immigrant with a misdemeanor or felony could place them either below or above the sentence she or he would receive in New Mexico.

In fact, outside the border districts, such as in the Northern District of Texas, some of the judges can give sentences that are twice as long as those given out in New Mexico for similar re-entry crimes. For example, the judicial author once had a defendant in front of him who was sentenced to 96 months by a Northern District of Texas judge, but in New Mexico he ended up getting sentenced to 18 months.[297]

It has been the policy of the judges of the District of New Mexico that they sentence a re-entry defendant to time as soon as possible. This policy is exhibited in a number of different ways. The District stations two district judges in Las Cruces, New Mexico.[298] It places nearly a third of

293. *Id.*

294. Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't Justice, Department Policy on Early Disposition or "Fast-Track" Programs (Jan. 31, 2012), *available at* http://www.Justice.gov/dag/fast-track-program.pdf.

295. *Id.*

296. *See id.*

297. United States v. Calderon-Ramirez, CR 07-2066 JB, 2008 WL 2397661 (D.N.M. Jan. 30, 2008).

298. *See District of New Mexico Judges*, U.S. DISTRICT COURT, DISTRICT OF NEW MEXICO, http://www.nmcourt.fed.us/web/DCDOCS/files/judges.html (last visited Aug. 23, 2013).

the District's seven active judges in Las Cruces. Moreover, having judges travel there to conduct sentencing in Las Cruces sentences people faster and is more cost efficient than moving those defendants to Albuquerque.

The District also stations five Magistrate Judges in Las Cruces.[299] That means that more than half of the nine Magistrate Judges in the District are located near the border. While Magistrate Judges can handle some tasks on a felony case, only a District Judge can try a felony case and, perhaps more important in this context, only a District Judge can sentence a convicted felon.[300] The nation also sends visiting judges from other Districts to sit in Las Cruces, and the District Judges from the north frequently go to Las Cruces.

Civil lawyers may often wonder as they wait months for a decision from a District Judge to come out in a civil case, what it is a Federal judge does with his or her time. It is important to recognize, however, the impact the sheer number of illegal re-entry cases have on the resolution of every other civil and criminal case as well. Even the northern judges in Albuquerque and Santa Fe, who are not sentencing as many re-entry cases as the judges in Las Cruces,[301] are sentencing many difficult re-entry cases.[302] Some of these more difficult sentences are because the defendants have complex and complicated criminal histories, so the defendant is not looking at time-served sentences, but long, contested sentences. Even when the court is not sentencing in a re-entry case, the volume of re-entry cases makes it difficult to get to other criminal cases, such as those arising in Albuquerque's metropolitan area and on the 22 Native American reservations and pueblos in the District. New Mexico is not a sleepy backwater place when it comes to federal crime. It has the fourth highest number of criminal fillings per Federal Judge out of the 94 Federal Districts in the nation.[303] New Mexico's 179.5-mile-long border with Mexico[304] and three Native American reservations and 19 pueblos[305]

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299. *See id.*

300. 28 U.S. Code § 636(a).

301. Memorandum from Matthew J. Dykman, Clerk of Court District of New Mexico, to the Honorable James O. Browning, Federal Judge District of New Mexico (Nov. 6, 2014) (on file with authors) (outlining the routine transfer of defendants who are charged with illegal reentry with a maximum sentence of 10 years or more given their prior criminal record to Federal District Court in Albuquerque. In 2012, 349 such reentry cases were transferred to Albuquerque; in 2013, 419 such transfers occurred; and through Oct. 31, 2014, 421 such transfers have occurred in 2014.).

302. *Id.*

303. *See U.S. District Courts—Weighted and Unweighted Filings per Authorized Judgeship During the 12-Month Period Ending September 30, 2012*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/X01ASep12.pdf (last visited Aug. 23, 2013).

304. Janice Cheryl Beaver, Cong. Research Serv., *U.S. International Borders: Brief Facts* 2 (2006), http://www.fas.org/sgp/crs/misc/RS21729.pdf (last visited Aug. 31, 2013).

305. *See Pueblos and Reservations*, ALBUQUERQUE CONVENTION & VISITORS BUREAU,

provide for a robust federal docket.

VI. TRADITION AND STRENGTH OF INCREMENTAL CHANGE

In light of the national history of attempted immigration reforms, it is the strength and tradition of incremental change that will help the United States provide reform while simultaneously honoring our nation's core values.

Unlike parliamentary systems, where policies and laws can lurch dramatically depending on the latest election, one of the greatest strengths of the American political system is that it makes incremental changes in its existing laws. The three U.S. branches of government provide remarkable stability, predictability, and incremental change.

The *Financial Times* recently reported, "For the better part of a decade, there has been a broad consensus in the United States on the need for comprehensive immigration reform."[306] While it is common in the current political climate for the parties to call for comprehensive and sweeping legislation, whether for immigration, taxation, or healthcare, the rule should be that policymakers first look at making incremental changes. Particular times and issues certainly call for comprehensive legislation, but only when a broad consensus exists, that incremental changes will not do. This concept is, perhaps, most easy for American lawyers to grasp. When a person joins the legal profession in the United States, he or she joins a profession that is comfortable with marginal and incremental changes and less enthusiastic with broad sweeping change. The nation's common-law tradition and respect—if not reverence—for precedent makes lawyers value what an immense body of law the nation and its states have and hesitant to make wholesale changes. Rather than sitting down and writing out a code, like the Napoleonic or Justinian Code, the U.S. law is often derived from the most mundane cases, over hundreds of years. As Oliver Wendell Holmes stated in the memorable opening of his book, *The Common Law*:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of

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http://www.itsatrip.org/albuquerque/culture-heritage/native-american/pueblos-reservations.aspx (last visited Aug. 31, 2013).

306. Anna Fifield, *Immigration: The Road to Recognition*, FIN. TIMES (Jan. 22, 2013), http://www.ft.com/intl/cms/s/0/35714c70-6012-11e2-8d8d-00144feab49a.html#axzz2e5CjZkwS.

> a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[307]

The same observation holds true for our political system. In their book, *Politics, Economics, and Welfare*, Yale colleagues Robert Dahl and Charles Lindblom alluded to the elements of incremental decision-making processes, and what they offer.[308] Lindblom later picked up where he and Dahl left off by asserting that the process of decision-making through "partisan mutual adjustment" is what makes incrementalism an advantageous model for an organization, agency, or, for purposes of this Article, even a country facing complex decisions, such as immigration policy.[309]

Incrementalism is the process by which "policy emerg[es] gradually in small, incremental steps through a continual cycle of experimentation, reaction, and adjustment."[310] Before Lindblom's work on incrementalism, the prevailing decision-making process was thought by political scientists to be to create a single complete approach to the question or issue after considering the entire breadth of available information.[311] Lindblom, however, promoted the idea that "[a]lthough such an approach can be described, it cannot be practiced except for relatively simple problems and even then only in a somewhat modified form."[312]

Lindblom described comprehensive rationality as the opposite of incrementalism.[313] Accordingly, comprehensive analysis and decision-making requires policy makers to first, specify the objectives being sought, and then to identify all possible means of reaching those objectives. This process is followed by consideration of the effectiveness of each alternative approach before, finally, the adoption of the alternative that will come closest to achieving the objectives.[314]

While Lindblom was most known for applying this analysis to

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307. OLIVER WENDELL HOLMES, THE COMMON LAW 2 (Stuart E. Thiel & David Widger eds. & trans., Gutenberg Project 2000) (1881).

308. ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE (1953); *see also* Orion White, *Review: The Intelligence of Democracy: Decision Making through Mutual Adjustment by Charles R. Lindblom*, 18 W. POL. Q. 934, 934–35 (1965).

309. *See* White, *supra* note 308, at 935.

310. Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 512 (2008).

311. *Id.* at 514–15.

312. Charles Lindblom, *The Science of "Muddling Through*, 19 PUB. ADMIN. REV. NO. 2, Spring 1959, at 79, 80.

313. *Id.* at 79.

314. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396 (1981).

administrative agency decisions,[315] he also applied it to larger political decision-making processes as well, most notably in his book *The Intelligence of Democracy*.[316] In the book, Lindblom uses the terms partisan mutual adjustment in place of incrementalism and equates comprehensive rationality with centrally directed decision-making.[317] The analysis remains the same despite the terminology change.

The comprehensive method is not able to effectively handle differing values or objectives among decision-makers or changing objectives over time.[318] Because the comprehensive method requires decision-makers to start by considering a final objective and then working backwards to determine every possible means to reach that end, the comprehensive method requires a staggering amount of comparative analysis. When the decision makers disagree on policy objectives, or even small sub-objectives, the comprehensive model's one final objective requirement eliminates full consideration of each participant's relevant preferences around the margins.[319] As Lindblom writes, "[i]deal rational-comprehensive analysis leaves out nothing important. But it is impossible to take everything into consideration unless 'important' is so narrowly defined that analysis is in fact quite limited."[320] The more complex the problem, the simpler the decision-maker must make the response.

The benefits of partisan mutual adjustment, as Lindblom saw it, came from the step-by-step nature it embraced, which encouraged development to build upon the current position.[321] Simplification of complex problems is therefore achieved by considering the differences among the options at the margins independently.[322] This breaking down of complex problems into manageable parts is something the United States was already doing, Lindblom argued, in many facets.[323] Taking employment as an example, Lindblom said that, while both political parties favor the idea of full employment, they define full employment somewhat differently and compromise around the margins for each party to achieve its goals.[324]

This process of gradual change also means less risk for policymakers, as mistakes can be corrected quickly through the process of experimentation, feedback, and adjustment.[325] Further, as a result of knowing that the issues at the margin will and can be addressed, each

315. Lindblom, *supra* note 312, at 80.
316. *See* CHARLES LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965).
317. *Id.* at 10.
318. Lindblom, *supra* note 312, at 81.
319. *Id.*
320. *Id.* at 84.
321. *Id.* at 81.
322. *Id.* at 84.
323. *Id.*
324. *Id.*
325. *Id.* at 85.

decision-making representative is able to defend its objectives. In effect, they are able to serve as both an impetus for redressing wrongs and as a guardian for preventing those wrongs in the first place.

Partisanship and differing groups with distinct points of view are able to add value under incrementalism, as they assure or ensure that no elements get overlooked in the decision-making process.[326] As a result, the decision-making body excludes only those ideas that were deliberately and systematically rejected. The same cannot be said for the comprehensive alternative, which accidentally or purposefully must exclude ideas without full consideration, to create one decision that is limited enough so a majority can support it.[327] "Non-incremental policy proposals are therefore typically not only politically irrelevant but also unpredictable in their consequences."[328]

Consequences of these policy decisions are easily addressable under an incremental approach as well. Lindblom defined policy making as "a process of successive approximation to some desired objectives in which what is desired itself continues to change under reconsideration."[329] Incremental policy changes are established under the basis that they are never a final resolution to the problem, but rather can be quickly undone or changed as necessary. These smaller decisions can also be used to test possible ideas or solutions without causing any serious lasting mistakes.

There are disadvantages to the incremental process. The ability to make quick and successive changes to bad policy decisions can be corrupted by outside influences.[330] For example, in immigration policy, if it was found that locking up illegal immigrants was economically and logistically too much of a burden on the country's law enforcement system, Congress may decide to employ a quick deportation strategy. However, outside interest groups like the private prison industry, which has grown through federal contracts to house immigration detainees,[331] might fight such a policy change even in the face of evidence showing it is a bad policy.

Scholars have likewise commented on the limitations of Lindblom's incrementalism hypothesis. First, if the incremental changes end up having a significant impact, then the value of the resources spent to fix that bad decision could end up outweighing whatever possible benefit the

326. *Id.* at 86.

327. *Id.*

328. *Id.* at 85.

329. *Id.* at 86.

330. *Id.* at 86–87.

331. *See* Correction Corporation of America, http://www.cca.com/about/cca-history (last visited Aug. 23, 2013) ("First Federal Contract (November 1983): CCA receives a contract from the U.S. Department of Justice for an Immigration and Naturalization Services (INS) facility in Texas.").

small change would have made in the first place.[332] On the other hand, bad decisions are bad decisions, and fixing small mistakes is easier and less expensive than fixing big mistakes.

The requirement that the decision-making body respond to negative results from earlier decisions creates another problem when the negative results are not readily apparent. When faced with sleeper effects from a wrong decision, even an "incrementally oriented unit" that is anticipating errors and monitors for signals indicating a change is needed may miss the need for remedial action when a chain reaction of change creates a negative effect in a different subsystem.[333] One example of this problem could be the possibility that an increased deportation action would have on foreclosures in areas relying on immigrant populations to fill their rental units. The technological increases in computer modeling and statistical market analysis make such unforeseen effects less likely to go unnoticed. While Lustick is correct in saying that incrementalism is a "feedback-dependant decision strategy[y],"[334] modern modes of providing feedback today are more advanced than they were in 1980, thereby lessening the likelihood of unforeseen negative impacts.

Incrementalism's reliance on mutual adjustment from its disparate units encourages the disjointed pursuit of each unit's short-term goals and sees conflicts among these units as opportunities for better policies to emerge from the process. This process, therefore, requires a certain level of waste of resources.[335] When a country has a limited amount of such resources, it will be less likely to invest them in a process that promises small, incremental change while guaranteeing some waste.[336]

The limited resources criticism may be more applicable to business organizations, where Lustick shows that low profit margins have "led corporate executives to discard incremental . . . procedures, in favor of . . . comprehensive reorganizational schemes."[337] If political capital is considered as a resource, however, it is possible that the reoccurring investment of a legislature's political capital in a series of immigration programs that fail or achieve only partial success could result in a complete loss of all the political resources available. Some may argue this scenario is similar to the position the country is in now, where decades of "unsuccessful" immigration control experiments have led to the need to

332. Ian Lustick, *Explaining the Variable Utility of Disjointed Incrementalism: Four Propositions*, 74 AM. POL. SCI. REV. 342, 345 (1980) ("A trial-and-error, incrementalist approach . . . is based on a presumption that errors will be made, but that, overall, the value of the knowledge thereby gained . . . will exceed the value of the resources needed to remedy the results of those errors.").

333. *Id.* at 346.

334. *Id.* at 347.

335. *Id.* at 348–49.

336. *Id.* at 349.

337. *Id.*

abandon the process of incremental change in favor of comprehensive reform.[338] The likelihood that all political capital has been spent, however, is unlikely. Moreover, given the reoccurring attempts for comprehensive reform in the past three decades, such an assertion could further be countered by the argument that the incremental process has not been pursued and is not the result of any diminished political capital.

Finally, incremental change through mutual adjustment also requires an even distribution of power among the involved groups.[339] As the groups bargain with each other in attempting to further their own value preferences, the body as a whole benefits "only to the extent that all those who have theories or ranked preferences have access to the bargaining arena."[340] If one group that would oppose a decision ends up powerless, an effective watchdog capable of raising concerns as to its viability no longer protects that decision. An uneven distribution of power creates the opportunity for a more powerful group to ignore possible cause and effect warnings as their decision will no longer be confronted or analyzed by a decision-maker capable of getting noticed. As with the third criticism, the abuse-of-power concern here seems more applicable to private organizations as opposed to legislative decisions, which not only occur in the public record but also are subject to immediate news coverage and commentary.

Even considering these limitations inherent to the incremental process, it is still superior, as Lindblom said, "to a futile attempt at superhuman comprehensiveness."[341] It is unlikely that comprehensive immigration reform will pass, and even if it does, the comprehensive law will be unlikely to enjoy broad support. It risks being passed by highly partisan votes and legislative maneuvering, similar to that which accompanied enactment of The Patient Protection and Affordable Care Act.[342]

According to Steve Case, the co-founder of AOL, who now runs a start-up fund, "[t]here is desire on the part of the White House to deal with [immigration reform] in comprehensive way . . ."[343] However, comprehensive immigration reform runs the equal risk of being as unsuccessful as the 1986 Act, making it difficult to correct any unintended consequences. In the end, the nation's immigration system

338. *See, e.g.*, Richard Trumka, *We Need Comprehensive Immigration Reform Now*, THE HILL, June 20, 2014, *available at* http://thehill.com/opinion/op-ed/209959-we-need-comprehensive-immigration-reform-now.

339. Lustick, *supra* note 332, at 350.

340. *Id.*

341. Lindblom, *supra* note 312, at 88.

342. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

343. Fifield, *supra* note 306.

would be better served by incremental change in certain areas, where broad support exists, rather than trying to implement comprehensive reform that is divisive and unlikely to pass, and if it does pass, would be subject to considerable criticism.

VII. REFORMS THAT THE UNITED STATES SHOULD MAKE AND SHOULD NOT MAKE

The U.S. immigration laws by and large adequately reflect the nation's core values. There is no need for comprehensive immigration reform because our immigration system is not broken. Indeed, our immigration laws should be a point of pride. There is a widespread acknowledgment that immigrants have been a great benefit to the nation. The United States is an immigrant nation and that fact still resonates powerfully in the United States. There are, however, reforms and changes that the United States should make to its immigration laws. There are also changes that the United States should not make.

A. *DREAM Act or Cultural Assimilation Act*

One of the problems that the DREAM Act faces is its name. To some, the name connotes a sense of amnesty. In the federal courts, the U.S. Sentencing Commission has explicitly recognized a downward departure for cultural assimilation.[344]

Throughout his time on the bench, the judicial author has had to sentence aliens who were brought across the border when they were as young as two and three years old.[345] Not only do these defendants often not need an interpreter, they frequently speak English without an accent.[346] It is possible that while many of these defendants have faced criminal charges in the United States, when they are standing in the New Mexico District Court, it is the first time they have stood before a federal judge and they are afraid of leaving their families and going back to

344. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.8 (2012) [hereinafter SENTENCING GUIDELINES].

345. *See, e.g.*, United States v. Enriquez-Ramirez, No. CR 09-2441 JB, 2009 WL 5220463, at *1 (D.N.M. Dec. 11, 2009); *Almendares-Soto*, 2010 WL 5476767, at *11; United States v. Ochoa-Arrieta, No. CR 11-2149 JB, 2012 WL 2384103, at *2 (D.N.M. Apr. 23, 2012); United States v. Valdez-Flores, No. CR 11-2367 JB, 2012 WL 2384103, at *2 (D.N.M. June 12, 2012); United States v. Aranda-Daiz, No. CR 12-2686 JB, 2014 WL 3563264, at *3 (D.N.M. July 11, 2014).

346. United States v. Vallecillo-Rodriguez, 770 F. Supp. 2d 1194, 1201 (D.N.M. 2011) ("[T]he Court sees many defendants in illegal reentry cases who speak English, have family in the United States, have spent most of their life in the United States, and do not have any meaningful ties to Mexico.").

Mexico.[347] Being in federal court, however, they are not only risking deportation, but rather, they face an increasingly longer sentence in an American prison.[348]

Immigration and Customs Enforcement has now made permanent its twice-weekly flights from El Paso to Mexico City[349] in order to drop deportees 2000 miles south of the border. However, this deportation policy does not change the fact that many of the people brought to the United States at a young age and now are standing in front of the court are as American as any of the authors' children or grandchildren.

Before the U.S. Sentencing Commission expressly created a downward departure for cultural assimilation, federal courts, including the judicial author, had recognized a downward departure for cultural assimilation.[350] As an alternative to the DREAM Act, consider the language found in the current sentencing guidelines, which now explicitly recognize a downward departure for cultural assimilation.[351] The sentencing guidelines provide:

> There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases were (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood . . . . In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States . . .[352]

Thus, the primary reason to treat this group of aliens who are here illegally differently is that they do not have to culturally assimilate. The legislation would better convey this idea if it was named the Cultural Assimilation Act rather than the DREAM Act, which suggests amnesty for people in the United States illegally who dream to be citizens.

There are five reasons that Congress should pass a version of what would be better called the Cultural Assimilation Act. First, one of the things the federal courts try to do is treat similarly situated people

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347. *See, e.g.*, *Ochoa-Arrieta*, 2012 WL 1596939, at *4 ("[T]he primary motivation for Ochoa-Arrieta to return to the United States appears to have been family reunification, after the violence his family witnessed when they attempted to visit him in Mexico.").

348. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2014); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (2010).

349. *U.S. Begins Flying Deportees to Mexico City*, ASSOC. PRESS (July 11, 2013), http://bigstory.ap.org/article/us-begins-flying-deportees-mexico-city-0.

350. *See, e.g.*, United States v. Reyes-Campos, 293 F. Supp. 2d 1252 (M.D. Ala. 2003).

351. *See* SENTENCING GUIDELINES, *supra* note 344.

352. *Id.*

equally.[353] For instance, [t]he federal courts try to sentence similar people convicted of the same crime in New Hampshire and in New Mexico the same. Uniformity is one of the guiding principles of the guidelines.[354] It seems to be unfair to allow a boy born in the United States and then raised in Mexico City to come to the United States anytime he wants while the nation deports a boy who was brought here when he was two and raised continuously in Albuquerque, New Mexico.

Second, the American criminal justice system tries not to punish the son for the sins of the father. A two-year-old boy has very little say in whether he is going to live in Juarez or in Albuquerque. As a result, it is difficult to say that a two-year-old illegally entered the United States. Re-entry crimes require that the defendant came to the United States intentionally and voluntarily;[355] it is unlikely that a small child came to the United States voluntarily.

Third, there are some in the nation who are opposed to immigration because they believe the groups immigrating here are not culturally assimilating fast enough, if at all. However, this lack of immigrant assimilation objection does not make sense when applied to children born in a foreign country but raised entirely in the United States.

Fourth, a limited Cultural Assimilation Act is not going to open up the floodgates of new immigrants. The young people applying for cultural assimilation placement are already here. These young people would only be eligible if they did not have a criminal record. Finally, the young people would have to get a college degree or join the military.[356]

Fifth, unlike the 1986 IRCA,[357] which was plagued by a black market for false immigration documents, it seems that a rigorous screening process will allow only young people who have been in the United States for a prolonged time to be eligible for legal status. School records, medical records, and other facts should be able to provide a robust record that keeps fraudulent applications to a minimum. In other words, the risks of fraudulent documentation seems manageable and not a reason to avoid creating a path for legal status for this group of aliens.

There are, however, two caveats. First, while the greatest justification for a cultural assimilation path to legal status and/or citizenship is based on the age and innocence of the child when he or she arrives in the country, the current proposed age limit seems to be too generous. Under

353. *See generally* U.S. CONST. amend. XIV, § 1.

354. U.S. Sentencing Comm'n, An Overview of the U.S. Sentencing Commission, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited Aug. 29, 2013).

355. *See, e.g.*, United States v. Reyes-Ceja, 712 F.3d 1284 (9th Cir. 2013).

356. Secure America and Orderly Immigration Act, *supra* note 266, § 701.

357. *See* Immigration Reform and Control Act of 1986 (codified at 8 U.S.C.A. § 1324a (West Supp. 1987).

the past DREAM Act proposals, anyone 15-years old or younger is eligible for residency.[358] It is not uncommon, however, to see 13, 14, and 15-year-old boys come over from Mexico on their own. Of course, these young people may have nothing in Mexico, but there is also a greater likelihood of assimilation if the child's eligibility was based on being in the country before puberty, roughly 12 years old. The younger they are, the more likely they have mastered English, have gone to school in the United States from an early age and have culturally assimilated. For ages 12 to 16 there could then be a rebuttable presumption that the child came over on his or her own. The defendant would then have to show that they were brought over by their family, rather than on his or her own to overcome that presumption.

Second, the incremental approach suggests that the policymakers should consider whether it is necessary or desirable to create a direct pathway to citizenship for this group. For young people who join the military, it may make sense to give them a direct path to citizenship. For young people who get a college degree, it may make sense to incrementally give them permanent legal status and then require them to get in line under the normal process in order for them to get their citizenship. This would allow this group of illegal immigrants who have gone on to get a college degree to stay in the United States legally while they await possible citizenship as opposed to returning to their native country.

On the other hand, from a justice standpoint, there is no sound reason to limit legal status to those who go to college. While it may be economically good for the nation to pick out of this group only college graduates, there is no sound reason from a justice standpoint to discriminate between college graduates and non-graduates. Many immigrants without college degrees have made contributions to the nation, and it is elitist to give a boy or girl who graduated from college something the nation will not give to a hard-working boy or girl who skips college and starts a software company.

Again, the focus should be on cultural assimilation rather than on some other person's "dream." In sum, give young people who join the military a direct path to citizenship, but give legal status and the ability to gain citizenship, without having to return to their home country, to young people who are: (1) 12 years old or younger, or (2) older than 12 years old but younger than 15 years old and able to prove they were brought here by a parent or guardian.

358. *See* Development, Relief, and Education for Alien Minors Act of 2011 § 3(b)(1)(B), S. 952, 112th Cong. (2011).

B. *Guest Worker Program*

It is beyond the scope of this Article to thoroughly discuss the economics of immigration. A review of the literature—on both sides of the spectrum—shows that both some conservatives and some liberals oppose immigration on economic grounds. Businesses tend to want cheap labor and are largely in favor of immigration, while labor unions tend to oppose any influx of cheap labor. It is probably safe to say that immigration puts some downward pressure on wages,[359] but cheaper products and services may compensate for any lowered wages.[360] In any case, without an extended defense of this point, this Article assumes that there are no strong economic arguments against immigration.[361] It would seem to be best for the nation to not allow Congress or bureaucrats to decide what is best economically for the nation by expanding or restricting immigration, but let the market decide whether more or less immigration is necessary.

This deletion of economics from the immigration debate, at least in this Article, does not mean that immigration should not be both regulated and restricted. Immigration should not be regulated and restricted because of race, culture, or economics, but for one reason: security. There are many bad people in the world such as criminals, terrorists, and people who do not share U.S. core values. The United States should not admit criminals, terrorists, and those who do not support the Constitution. The United States should similarly not admit those who do not believe in racial equality, who do not tolerate other religions, or who do not believe women should be educated. The nation has struggled through more than two centuries of conflict and challenge to its core values, and it should not give membership to those who do not share those same core values. The focus of immigration regulation and restriction should be on security.

According to a U.S. Department of Labor survey, 53% of agricultural workers during 2001 and 2002 were unauthorized to work in the United States.[362] California farms can employ 450,000 people at the peak of the harvest and migrant farm workers can work for up to 7 months moving

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359. Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 152, 191 (2012) ("[O]nce imperfect substitutability between natives and immigrants is allowed for, over the period 1990-2006 immigration to the U.S. had at most a modest negative long-run effect on the real wages of the least educated natives.").

360. *See, e.g.*, Gordon Hanson, *Illegal Immigration: Considering the Benefits and Costs*, AMERICAN ENTERPRISE INSTITUTE IDEAS BLOG (Oct. 1, 2010, 7:13 AM), http://www.aei-ideas.org/2010/10/illegal-immigration-considering-the-benefits-and-costs.

361. *See id.*

362. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002, at 6 (2005), *available at* http://www.doleta.gov/agworker/report9/naws_rpt9.pdf (The National Agricultural Workers Survey was created in 1989 to help gauge the extent of farm labor shortages following the enactment of IRCA in 1986).

from harvest to harvest.[363]

As recent as 2005, there was a labor shortage in the California Central Valley.[364] The higher construction wages over farm wages was a dominant reason the agricultural sector faced earlier labor shortages.[365] Those shortages were corrected with the housing bust in 2008, but now the American Farm Bureau Federation and the California Farm Bureau Federation report that another labor shortage looms if nothing is done to reform immigration.[366] Farms in Alabama and Georgia have also reported acute labor shortages.[367]

According to the California Farm Bureau Federation, a farm-owner lobbying group, more than 70% of labor-intensive agricultural producers experienced a worker shortage in 2012.[368] It was later reported that the same proportion of producers expected the labor shortage to worsen though the 2013 growing season.[369] The California labor force could fall by more than 80,000 farm workers according to their estimates.[370] J. Edward Taylor, a University of California-Davis economist, says the labor-shortage problem is real and is twofold.[371] First, the children of the aging immigrant labor force do not want to work in the fields like their parents did; and second, the influx of new workers from Mexico is dwindling.[372]

Taylor further states that the farm worker shortage is the result primarily of a "combination of a declining farm labor supply [in Mexico] and rising demand for labor on Mexican farms."[373] Secondary to this, he says, are the immigration policies and the violence in Mexico's border-

363. Julia Preston, *Pickers Are Few, and Growers Blame Congress*, N.Y. TIMES (Sept. 22, 2006), http://www.nytimes.com/2006/09/22/washington/22growers.html?pagewanted=all&_r=0.

364. Richard Gonzales, *California Farm Workers Look to Other Jobs*, NAT'L PUB. RADIO (Sept. 27, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=4865345.

365. *Id.*

366. *See Agricultural Labor Reform*, AM. FARM BUREAU FEDERATION, http://www.fb.org/index.php?action=issues.aglabor (last visited Aug. 31, 2013); CALIFORNIA FARM BUREAU FEDERATION, WALKING THE TIGHTROPE: CALIFORNIA FARMERS STRUGGLE WITH EMPLOYEE SHORTAGES 1 (2012), *available at* http://www.cfbf.com/employmentsurvey/pdf/CFBF_Farm_Employment_Survey2012.pdf.

367. Fifield, *supra* note 306.

368. CALIFORNIA FARM BUREAU FEDERATION, *supra* note 366, at 2.

369. Peter Hecht, *Farm Labor Shortage Looms as California Workers Age*, SACRAMENTO BEE (Mar. 11, 2013), http://www.mcclatchydc.com/2013/03/11/185405/farm-labor-shortage-looms-as-california.html.

370. *Id.*

371. *Id.*

372. *Id.*

373. J. Edward Taylor et al., *The End of Farm Labor Abundance*, 34 APPLIED ECON. PERSP. & POL'Y 587 (2012).

regions.[374] "Tighter border enforcement and drug-related violence along the border may deter migration, but our analysis suggests that their effect is largely secondary, reinforcing a negative trend in the immigrant farm labor supply."[375]

There is a broad consensus that the nation needs some amount of unskilled labor in certain sectors like agriculture, construction, and hospitality, but the current system makes workers cross the border illegally so they can make a mad dash to higher paying jobs in construction when those become available. It would make more sense to have the farmers from Sacramento or the construction crews from Phoenix pick up the workers legally at the border. The employer would pay for their transportation to the worksite, help them with housing, provide them with medical insurance, and then provide them with return transportation to the border when the work is complete. Such an arrangement would help reflect the true value of "cheap labor." Most likely, corporations would then grow up on both sides of the border, recruiting labor and getting the workers to the border and then on to the employer. Ultimately, the current mad dash of foreign, unskilled employees from one job to the next while living in the shadows should not be mistaken for a national labor policy.

An orderly entrance into the country will be needed to ensure that the unwelcome elements are kept out. The hyper-regulation that the Senate immigration bill proposes is overly complicated and unnecessary. There is no sound reason for Congress to tell the employers how much to pay the workers or to restrict the number of workers who want to come to the United States; if Congress does put its finger on the scale by expanding or restricting immigration, it will be deciding the winners and losers as opposed to letting the market decide.

Given that, "enforcement-only" measures have not worked to eliminate illegal immigration and has put downward pressure on wages in a broad swath of categories.[376] Doing the same thing again is not likely to have measurably different results. Yet, the federal government's current policy—and probable policy for the foreseeable future—is to step up its enforcement-only strategy.[377] Immigration reform that gives legal status to many currently unauthorized immigrants and gives them legal status in the context of full labor rights would help American workers and the U.S. economy.

There is evidence that reform would raise the "wage floor" for the U.S. economy to the benefit of both immigrant and native-born

374. *See id.*

375. *Id.* at 588.

376. *See* Taul Himojosa-Ojeda, *The Economic Benefits of Comprehensive Immigration Reform*, 32 CATO J. 175 (2012).

377. *Id.*

workers.[378] The historical experience of legalization under IRCA indicates that some reforms would raise wages, increase consumption, create jobs, and generate additional tax revenue.[379] Even IRCA was implemented during a period that included a recession and high unemployment (1990-91), it still helped raise wages and spurred increases in education, residential, and small business investments by newly legalized immigrants.[380]

The Cato Institute, by "taking the experience of IRCA as a starting point, estimate[s] that . . . immigration reform would yield at least $1.5 trillion in added U.S. Gross Domestic Product (GDP) over 10 years."[381] Similarly, using a Computable General Equilibrium model (CGE),[382] in August 2009 the Cato Institute estimated that "[a] policy that reduces the number of low-skilled immigrant workers by 28.6 percent compared to projected levels would reduce U.S. household welfare by about 0.5 percent, or $80 billion."[383] And "[t]he positive impact for U.S. households of legalization under an optimal visa tax would be 1.27 percent of [the] GDP or $180 billion."[384] These economic projections provide a compelling reason to move away from an enforcement-only policy that institutionalizes unauthorized immigration and exerts downward pressure on wages and toward a policy of worker empowerment in which legal status and labor rights exert upward pressure on wages.

In his article, Hinojosa-Ojeda uses a CGE model to estimate the economic ramifications of three different scenarios: (1) comprehensive immigration reform that creates a pathway to legal status for unauthorized immigrants in the United States and establishes flexible limits on permanent and temporary immigration that respond to changes in U.S. labor demand in the future; (2) a program only for temporary workers that does not include a pathway to permanent status or more flexible legal limits on permanent immigration in the future; and (3) mass deportation to expel all unauthorized immigrants and effectively seal the United

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378. *Id.*

379. *Id.* at 176.

380. *Id.*

381. *Id.*

382. *See* IAN SUE WING, MIT JOINT PROGRAM ON THE SCIENCE AND POLICY OF GLOBAL CHANGE, COMPUTABLE GENERAL EQUILIBRIUM MODELS AND THEIR USE IN ECONOMY-WIDE POLICY ANALYSIS 2 (2004) ("CGE models are a standard tool of empirical analysis, and are widely used to analyze the aggregate welfare and distributional impacts of policies whose effects may be transmitted through multiple markets, or contain menus of different tax, subsidy, quota or transfer instruments.").

383. Peter B. Dixon & Maureen T. Rimmer, *Restriction or Legalization? Measuring the Economic Benefits of Immigration Reform*, Trade Policy Analysis Paper No. 40, CATO INST. (2009), *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/ tpa-040.pdf.

384. *Id.*

States-Mexico border.[385] The CGE model shows that the first scenario produces the greatest economic benefit:

> (i) Immigration reform generates an annual increase in U.S. GDP of at least 0.84%. This increase amounts to $1.5 trillion in additional GDP over ten years. It also boosts wages for both native-born and newly legalized immigrant workers. The effect would generate a $5.3 billion increase in California, a $1.9 billion increase in Los Angeles County, and a $1.68 billion increase in Arizona.
> (ii) The temporary worker program generates an annual increase in U.S. GDP of 0.44%. This increase amounts to $792 billion of additional GDP over 10 years. Moreover, wages decline for both native-born and newly legalized immigrant workers.
> (iii) Mass deportation reduces U.S. GDP by 1.46% annually. This decrease amounts to $2.6 trillion in lost GDP over 10 years, not including the cost of deportation. Wages would rise for less-skilled native-born workers, but would decline for higher-skilled natives, and would lead to job loss. California would lose 3.6 million jobs under this scenario and its economy would shrink by $30.2 billion. Los Angeles County would suffer 1.3 million job losses at a cost of $106 billion to the county's economy. In Arizona, mass deportation would amount to 581,000 lost jobs and a $48.8 billion contraction of the state economy.[386]

Therefore as long as someone wants to come and work and obey the nation's laws, there does not appear to be a sound economic reason not to allow them to come.

C. *Green Card*

A similar analysis is applicable to workers at the other end of the skill spectrum. It may be that the United States needs more of the highly educated students who come here on education visas, particularly in the high-tech sector of the nation's economy, because not enough Americans are going into those fields.[387] Former New York City Mayor Michael Bloomberg is a vocal proponent of this and perhaps he is right.[388]

There is also the argument that, because U.S. universities are training

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385. Himojosa-Ojeda, *supra* note 376, at 177.

386. *Id.*

387. *See, e.g.*, *Immigrants Behind 76% of Patents from Top American Universities*, MIKE BLOOMBERG (June 26, 2012), http://www.mikebloomberg.com/index.cfm?objectid=29767068-C29C-7CA2-F879E8028EF01C25.

388. *Id.*

and educating these highly sought after employees the nation should do all it can to keep them and their skill set. Again, however, it is probably best to let the market decide whether the nation needs more workers and at what wage rates. Letting the market decide the need and wages, as opposed to Congress or a bureaucratic agency, would remove the anecdotal nature of some of the current assertions that more foreign STEM workers are needed. Tying the range of annual visas available for allocation each year to the unemployment rate or other indicators will make some sectors winners and other sectors will be losers. In the end, scholars and policy makers will endlessly debate whether there are enough workers and whether American workers are being supplanted, rather than letting the market function.

Congress should increase the number of H-1B and EB-5 visas. These citizens are here legally, and for many, the United States has invited them here. The country should therefore allow a path to permanent residency for these workers. For EB-5 visa holders, requiring that a $100,000 investment with a two-person hire requirement the first year and a five-person requirement after three years would be reasonable. The Labor or Commerce Departments could then verify that these entrepreneurs are not gaming the system by creating phony businesses to gain permanent residency. However, simply because a program could be susceptible to some fraud and abuse does not seem to be a good enough reason not to construct it.

The Honorable Richard Posner, a Seventh Circuit Court of Appeals Judge, has made the case that we should adopt a select number of criteria, such as age, health, and criminal history, to screen would-be immigrants, coupled with a residency requirement for welfare benefits and then let the market decide the value of a visa so that any would-be immigrant does not weigh on our support services.[389] This market would also let the employer decide whether it wants to train a U.S. citizen to perform the job its looking to fill or if bringing over a foreign worker would make more sense. Part of the visa cost could then be invested into STEM education and training programs for Americans.

While it would probably be best to sell visas, the auctioning of entry is inconsistent with the American tradition of being open to immigrants. With skilled workers, it is unlikely that they will be a drain on social services, but would likely be an economic benefit to the nation. It would seem that Congress should allow as many of these visas as politically possible, without tying the visas to an abstract measure of the economic future that would allow Congress to arbitrarily ratchet the number

389. Hon. Richard Posner, *Immigration Reform – Posner Comment*, BECKER-POSNER BLOG (Feb. 21, 2005, 7:51 PM), http://www.becker-posner-blog.com/2005/02/immigration-reform--posner-comment.html.

downward. Instead, the market should control the number of skilled workers who want to and are able to come.

D. *Pathway to Citizenship/Amnesty*

In regard to amnesty, the judicial author must first admit the difficulty he has personally, after spending ten years sentencing hundreds of defendants to prison for immigration crimes, to now reward those who were not caught. To now reward those who were not caught with the prize of citizenship does not provide justice to those who did not break the law or to those who have been lawfully waiting in their home countries for a chance at a visa. It does not provide justice for the holders of new citizenship and naturalization ceremonies. In sum, before Congress gives citizenship to those illegally here, it needs to consider carefully the effect it would have on four groups: (1) those who have been in prison for immigration crimes; (2) those who are currently in prison for immigration crimes; (3) those who have not come to the United States illegally and are waiting to come; and (4) those who have come to the United States as citizens.

Also, it should be recognized just how rare it is for a country to grant amnesty and agree not to prosecute an entire class of defendants. There are the occasional state tax amnesty programs and some jurisdictions will occasionally tell those with outstanding bench warrants that the warrant will be quashed if they show up and correct the underlying issue by a certain date, but even those instances are rare.[390]

While society wants to bring undocumented immigrants "out of the shadows," it is also telling that society does not use that phrase for any other criminal activity. Accordingly, it is important that the nation and the world recognize what an extraordinary exception this path to citizenship would be from how criminal justice ordinarily operates in this country. Moreover, there is a large gap between the need to come out of the shadows due to illegal status and citizenship. To address the concern of coming out of the shadows, it is sufficient that those here illegally be given legal status. It is not necessary to give this group the greatest gift that the nation can give—citizenship—to have them come out of the shadows.

On the other hand, it should be concerning to those who want justice that the United States may have enticed workers here by not enforcing its laws for years and then changed the rules to begin criminalizing the same practices that were de facto allowed before the closed border policy.

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390. *See, e.g.*, *Clear Up Those Outstanding Warrants During Amnesty Week in Deming*, DEMING HEADLIGHT (Sept. 1, 2013), http://www.demingheadlight.com/ci_23995776/clear-up-those-outstanding-warrants-during-amnesty-week; JUDICIAL BRANCH OF CALIFORNIA, AMNESTY PROGRAM FOR TRAFFIC TICKETS (2012), http://www.courts.ca.gov/15831.htm.

While the previous quasi-open border policy does not rise to the level of legal entrapment, there is some unfairness to those who have truly come here just to work during the times when they were welcomed and then, through that act alone, end up violating a criminal law. Many came here without ever thinking or caring about if they would get citizenship. However, they also probably thought that they could work here and, for the recent past, they expected that they would be merely deported if caught, not thrown in prison for illegally re-entering.

As a result, a form of amnesty could be offered to those who came at some point after 1986, when the country began to invite undocumented workers, and 2005, when the United States started vigilantly enforcing its border laws again. For that period of time, those who came here to work may have had a legitimate expectation that they could come and stay to work. The path should, however, lead to legal residency rather than create a path to citizenship. They had no expectation that they would get citizenship. Indeed, after IRCA, they were told they would not get citizenship.

It is difficult to reconcile the current proposals for providing a path to citizenship or amnesty for the 11 to 12 million undocumented immigrants currently residing in the United States with the principles discussed above. Two of the key goals of the American criminal justice system are to promote respect for the law and offer adequate deterrence. On the morning after a pathway to citizenship bill is passed, all the criminal laws that federal judges apply every day will still be in place. It will still be illegal to come into the United States except through a checkpoint. It will still be illegal for an alien to come to the United States without the permission of the Secretary of Homeland Security. And it will still be illegal to re-enter the country after being deported. To give citizenship to people who came here illegally with no expectation of citizenship undercuts the respect for the law and general deterrence.

Given the country's experience following Reagan's amnesty in 1986, it is hard to imagine how another pathway to citizenship or amnesty program promotes respect for the law or offers adequate deterrence. Even with an alternative pathway to legal residency, measures would need to be in place eliminating the possibility of black markets forming where newly immigrated aliens could purchase documents purporting to show their post 1986 entry and pre-2000 residency.

Many people seem to think that necessary to the creation of any pathway to citizenship or legal status is also be a judgment of how much more the country is prepared to spend on border security. There is, however, no necessary link from a justice standpoint between a pathway to legal status and border security. If a Cultural Assimilation Act, more STEM visas, or a pathway to legal status is needed from a justice standpoint, they should be done, and not delayed for a debate on border

security. They are, from a justice standpoint, two distinct and different issues that do not have to be reconciled. Fighting crime is always a cost-benefit analysis in a free society and immigration crimes are no different. As stated above, the nation is already spending more on the border security than it does on other internal security measures. It is debatable how much more as a nation the United States can spend to reach a goal of reducing illegal immigration to zero. Moreover, what dollar level will ensure the nation's border security concerns begin to address the employer-side of the illegal immigration problem? It is unrealistic to focus only on the supply side of the problem and ignore the demand-side while expecting to make serious inroads into restricting illegal immigration.

Finally, if the immigrants already here illegally are going to go to the back of the line in the pathway to citizenship, the question becomes, what is the line? If it is the back of the current line to get into the United States legally, then this entire citizenship discussion is a cruel hoax. The current line for citizenship or legal entry into the United States is so long that no one in the back can ever really expect to get to the front.[391] As a May 21, 2013 Gallup poll indicates, there are 138 million people, 3% of the world's adult population, who would like to leave their home country and immigrate to the United States.[392] Adding another 12 million formerly undocumented immigrants to the back of the line is a path to nowhere.

More likely, if the nation wants a pathway to citizenship or amnesty, it will be forced to create a new line for those who have illegally entered the country previously. If the new line leads to citizenship, the nation would then be talking about preferential treatment. Again, such a scenario would be difficult to reconcile with the race-neutral principles that this Article has developed for judging whether we have a just immigration system.

The most just path would be to manage the current line for the vast majority of immigrants and would-be immigrants, creating pathways to citizenship only for those culturally assimilated immigrants who came here before 12 years old. For others, the pathway should lead to legal status. From there, they can get in the same line to citizenship. Such an arrangement is more than just and fair; it is generous. Many people in the world would love to have legal status in the United States while they wait to become citizens. Moreover, people who came here illegally but did not commit any other crime receive a considerable benefit.

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391. *See, e.g.*, IX BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULL. No. 60 (Aug. 12, 2013), *available at* http://travel.state.gov/visa/bulletin/bulletin_6050.html.

392. Jon Clifton, *More Than 100 Million Worldwide Dream of a Life in the U.S.*, GALLUP (Mar. 21, 2013), http://www.gallup.com/poll/161435/100-million-worldwide-dream-life.aspx.

VIII. CONCLUSION

Some may lament that Congress is sadly lacking a cohesive and comprehensive approach to immigration reform, but the authors are not among them. As believers in the nation's common-law system, the authors are more skeptical of comprehensive legislation than of a few well-drafted, focused bills on certain areas of immigration reform. Some people and members of Congress will choose to frame and decide the immigration issue based on economics, some on bigotry, and some on politics. Whatever happens, the authors are confident and optimistic that the U.S. democratic and legislative process will work, as it has in the past, to continue to improve the immigration process and make it more just.

The United States is a grand experiment, now with 312 million people, and it will continue to be more just to the alien and strive to be even fairer. In the meantime, however, what the nation has is not bad. Indeed, just as the federal judiciary is the greatest judicial system that the world has ever seen, the U.S. immigration policy is an extraordinary point of pride for the nation and far from broken.